C-727/22-1

SUPREME COURT

S:AP:IE:2022:000001

**IN THE MATTER OF ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION AND IN THE MATTER OF A REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION**

THE CHIEF JUSTICE

MR JUSTICE MacMENAMIN

MS JUSTICE DUNNE

MR JUSTICE CHARLETON

MS JUSTICE O'MALLEY

MS JUSTICE BAKER

MR JUSTICE HOGAN

Court of Appeal No. A:AP:IE:2020:000119
High Court 2018 No. 391 JR

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

THE GOVERNMENT OF IRELAND

MINISTER FOR HOUSING

PLANNING AND LOCAL GOVERNMENT

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

**ORDER DATED THE 24th DAY OF NOVEMBER 2022**
**FOR REFERENCE TO THE**
**COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO**
**ARTICLE 267 OF THE TREATY**

The Notice of Appeal by the Applicant filed on the 4th day of January 2022 by way of appeal from the Judgment of the Court of Appeal (Ms Justice Costello Mr Justice Haughton Mr Justice Murray) given on the 26th day of November 2021 and the Order made on the 7th day of December 2021 which dismissed the Applicant's Appeal from the Judgment and Order of the High Court (Mr Justice Barr) given on the 24th day of April 2020 and the Order made on the 13th day of May 2020 that the Applicant's motion dated the 16th day of May 2018 for Orders of *Certiorari* by way of application for judicial review quashing the decision of the Government of Ireland on the 16th day of February 2018 and re-affirmed by a subsequent decision on 29th day of May 2018 to adopt the National Planning Framework and the National Development Plan and other related reliefs is refused and for an Order setting aside the said Judgments and Orders on the grounds and as set forth in the said Notice of Appeal having come on for hearing before this Court on the 18th and 19th days of July 2022

Whereupon and having read the Determination of this Court dated the 21st day of February 2022 granting leave to appeal herein the said Notice of Appeal the said Orders the documents therein referred to the judgments of the Court of Appeal and of the High Court and the written submissions filed on behalf of the respective parties and having heard Counsel for the Applicant and Counsel for the Respondents

IT WAS ORDERED that the case should stand for judgment

And the matter having been listed for judgment on the 9th day of November 2022 and judgment having been delivered on that date and the parties having been given an opportunity to make observations on a draft Order for Reference

And It Appearing that the facts and proceedings are as set forth and included in the Order for Reference annexed hereto

And it further appearing to this Court that the determination of the issues between the parties on this application raise questions concerning the correct interpretation of certain provisions of European Union Law namely the requirements of Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment the Strategic Environmental Assessment Directive (the "SEA Directive", or the "Directive")

**THE COURT HAS DECIDED TO REFER** to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union as set out in the said Order for Reference the questions:

1: Must Article 2(a) of the SEA Directive, read in conjunction with Article 3(2)(a), be interpreted to mean that a measure adopted by the executive arm of a Member State, other than by reason of a legislative or administrative compulsion, and not on the authority of any regulatory, administrative or legislative measure, is capable of being a plan or programme to which the Directive applies, if the plan or programme so adopted sets a framework for downstream grant or refusal of development consent and thus satisfies the test from Article 3(2) of the Directive

2(a): Must Article 3(1) read in conjunction with Article 3(8) and (9) of the SEA Directive be interpreted to mean that a plan or programme which makes specific, albeit described as "indicative", provision for the allocation of funds to build certain infrastructure projects with a view to supporting the spatial development strategy of another plan, itself forming the basis of downstream spatial development strategy, could itself be a plan or programme within the meaning of the SEA Directive?

2(b): If the answer to 2(a) is yes, does the fact that a plan which has as its objective the allocation of resources, mean that it must be treated as a budgetary plan within the meaning of article 3(8)?

3(a): Must Article 5, and Annex 1, of the SEA Directive be interpreted to mean that where an environmental assessment is required under Article 3(1), the environmental report for which provision is made therein should, once reasonable alternatives to a preferred option are identified, carry out an assessment of the preferred option and the reasonable alternatives on a comparable basis?

3(b): If the answer to question (a) is yes, is the requirement of the Directive met if the reasonable alternatives are assessed on a comparable basis prior to the selection of the preferred option, and thereafter the draft plan or programme is assessed and a more complete SEA assessment then carried out in regard to the preferred option only?

**AND IT IS ORDERED** that the further hearing of this Appeal do stand adjourned until after the said Court of Justice of the European Union shall have given its preliminary ruling on the said questions or until further Order in the meantime.

**JOHN MAHON**

**REGISTRAR**

**CHIEF JUSTICE**

**Perfected this 24th day of November, 2022**

# AN CHÚIRT UACHTARACH
# THE SUPREME COURT

S:AP:IE:2022:000001

A:AP:IE:2020:000119

High Court Record No.: 2018 391 JR

[2022] IESC 42

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

BETWEEN/

FRIENDS OF THE IRISH ENVIRONMENT CLG

Applicant/Appellant

- AND –

THE GOVERNMENT OF IRELAND

MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT

IRELAND AND THE ATTORNEY GENERAL

Respondents

**Order for Reference dated the 24th day of November, 2022**

**1.** The Supreme Court has, by its judgment delivered 9 November 2022, ([2022] IESC 42) decided to refer to the Court of Justice, pursuant to Article 267 of the Treaty on the Functioning of the European Union, three questions arising in respect of the interpretation of Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, the Strategic Environmental Assessment Directive (the "SEA Directive"), transposed into Irish law by SI 435/2004 the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 and SI 200/2011 The European Communities (Environmental Assessment of Certain Plans and Programmes) (Amendment) Regulations 2011.

**2.** The request arises in an appeal in a challenge to the two strands of Project Ireland 2040 adopted by the Government of Ireland on 16 February 2018, and "re-affirmed" by a subsequent decision of the Government on 29 May 2018. Project Ireland comprises two plans, the National Planning Framework (where convenient "NPF") and the National Development Plan (where convenient "NDP").

**3.** The challenge is to the validity of the adoption of both plans on account of the alleged failure to meet the requirements of the SEA Directive. In regard to the NPF, it was contended that the treatment of reasonable alternatives, as required by the Directives, was insufficient.

**4.** A logically prior question arises as to whether the NPF and/or the NDP is a "plan or programme" within the meaning or scope of the Directive. The respondents argued that whilst the NPF was assessed for the purposes of the SEA Directive, this was not done by reason of a legal obligation. Separately, they contend that the NDP is by reason of being a "budgetary policy" excluded by reason of Article 3(7) from the scope of the SEA Directive.

**5.** The publication of Project Ireland 2040 is described in the foreword as creating a unified and coherent plan for the land use and development within the country, and was

described by Barr J. in the High Court (at para. 5 of his judgment) as "a macro spatial strategy which maps out general development goals for the country for the period up to 2040".

**6.** The foreword to the NPF describes it as "a planning framework to guide development investment over the coming years" and that it sets "national objectives and key principles from which more details and refined plans will follow". That does not in terms provide every detail for every part of the country but rather "empowers each region to lead in the planning and development of their communities" and that it contains "a set of national objectives and key principles from which more detailed and refined plans will follow". The foreword also provides that a "companion" to the document is the NDP, described as a "ten-year strategy for public capital investment of almost €116 billion".

**7.** The draft NPF, accompanied by the SEA Environmental Report prepared by RPS Consultants, was published on 26 September 2017.

**8.** The NPF was published with the National Development Plan, an investment plan to insure and support implementation by the provision of capital investment, part of which was a dedicated €3 billion regeneration and development fund for urban and rural areas, as it sets out how funding will be made available for certain projects considered essential to the achievement of the strategic outcomes identified in the NPF. The NDP identifies major infrastructure works it proposes to fund such as railway, road and airport infrastructure. It does not concern itself with any planning or development considerations.

**The First Issue and Conclusion of this Court: the National Planning Framework**

**9.** To require assessment under the SEA Directive, a plan or programme must meet the threshold requirements of within the meaning of Article 2(a). The arguments before this Court concerned whether the NPF was a plan or programme which was:

"subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and — which are required by legislative, regulatory or administrative provisions".

**10.** Where the NPF was determined to require assessment under Council Directive 92/42/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna ("the Habitats Directive"), it was accepted that the NPF met the requirements of Article 3(2)(b) of the SEA Directive. The respondents allege that the NPF falls outside the scope of the SEA Directive on the ground that it is not a plan or programme specified in Article 2(a)."

**11.** This Court concluded that the NPF had been adopted by executive decision of Government pursuant to its power vested in it by Article 28.2 of the Constitution. This is an autonomous, self-executing power, the exercise of which does not in any sense depend on statutory authority and for which no legislation is required. This Court took the view that judged at least by the bare language of the text of the Directive, a document of this kind prepared by the Government cannot be seen as coming within the scope of Article 2(a) of the Directive.

**12.** Second, this Court found that the adoption of the NPF was not regulated by any legislative or regulatory provisions, nor is there any legislative regulatory or administrative provision which provides who may adopt such a plan and the procedure for preparing the measure, save for procedures requiring publication after the plan is adopted.

**13.** It is true that the NPF may therefore be said to have been prepared or adopted by an authority at national level within the meaning of the fourth and fifth lines of Article 2(a) of the Directive, as the Government is obviously such a body. Yet given the autonomous nature of the executive power granted to the Government by Article 28.2, there is really no sense in which it could properly be said that the preparation or adoption of the NPF could be said to

have been "required by legislative, regulatory or administrative provisions", even allowing for the broad interpretation of the word "required" contained in the judgments of the CJEU in *A and Others (Wind Turbines at Aalter and Nevele)* (Case C-24/19, EU:C:2020:503) and in *Bund Naturschutz in Bayern v Landkreis Rosenheim* (Case C-300/20, EU:C:2022:102) Specifically, there is here no "particular legal basis authorising the competent authorities to adopt that plane or programme, even if such adoption is not mandatory": see *Bund Naturschutz in Bayern* at para. 37.

**14.** However, this Court noted that, in the language of *Bund Naturschutz in Bayern,* the "legal basis" for the adoption of the NPF could be regarded as the executive power of Government acting collectively derived from the Constitution.

**15.** This Court went on to find that the NPF was intended to influence some of the criteria for the grant of development consent for individual projects, and by reason of certain legislative provisions, regard is to be had to the provisions of the NPF in the adoption by local authorities of a development plan or a local area plan which in turn impacts upon decision-making at local level in application for development consent for projects. Thus, this Court took the view that the NPF undoubtedly has, and is intended to have, an effect on downstream decision making.

**16.** This Court held that the NPF is a framework document, particularly if one has regard to its purpose and effect. Choices were made in this document regarding the appropriateness of, for example, ribbon development along rural roadways of domestic dwellings, and for the purposes of general land use strategy for housing. That framework ultimately influences the choices made at regional, local and the grant of permission for projects. Certain other options, such as the development of new cities or large conurbations, or the development of corridors to the regions are foreclosed by the high-level choices there made.

**17.** This Court is aware that the test of whether the adoption of a plan or programme is "required" is not to be interpreted as a domestic measure, but is rather to be given its

autonomous meaning in European law. The jurisprudence of the CJEU supports a broad approach to the interpretation of the scope of the Directive, and this suggests that the word does not carry a normative meaning, that a literal interpretation of the word in the English language might otherwise connote, but is rather more akin to "regulated".

**18.** This Court accepted that the fact that the NPF was adopted on a voluntary basis is not determinative as such a test would not meet the diversity of situations or the wide-ranging practices of national authorities. This Court is also aware from the caselaw that the Court of Justice does not adopt a narrow view as to the word of "required" in the second indent of Article 2(a), and that the word cannot be read as if it were a provision of national legislation enacted on account of a mandatory requirement.

**19.** Given the expansive interpretation which the CJEU has already taken in respect of Article 2(a) in *A and others (Wind Turbines at Aalter and Nevele)* and *Bundnaturschutz in Bayern,* one cannot exclude the slight possibility that that Court will take a different view of these words ("required by legislative, regulatory or administrative provisions"), even if, as a matter of national constitutional law, the executive power of the Government, in this case to plan for the future development, derived from the Constitution cannot be regarded as being either legislative, regulatory or administrative in character.

**20.** This Court is a court of last resort for the purposes of Article 267(3) TFEU. In view of the decision of the CJEU in *Consorzio Italian Management e Catania Multiservizi* (Case C-561/19, EU:C:2021:799) (at para. 51) regarding the extent of that duty, this Court could not say that the issue presented is so clear such that it could comfortably arrive at its own conclusion on that question.

**21.** This Court has taken the view that the answer to this question concerning the scope of the SEA Directive is not *acte clair*, especially in the light of the purpose of the Directive, together with the principles from Article 37 of the Charter of Fundamental Rights which

advocated a high level of environmental protection, and the objectives of improvement of the quality of the environment and the principles of sustainable development.

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

**23.** It is therefore proposed that the first question to be asked is:

> **"1: Must Article 2(a) of the SEA Directive, read in conjunction with Article 3(2)(a), be interpreted to mean that a measure adopted by the executive arm of a Member State, other than by reason of a legislative or administrative compulsion, and not on the authority of any regulatory, administrative or legislative measure, is capable of being a plan or programme to which the Directive applies, if the plan or programme so adopted sets a framework for downstream grant or refusal of development consent and thus satisfies the test from Article 3(2) of the Directive"**

**<u>The Issue and Conclusion of this Court on the Second Issue: the National Development Plan</u>**

**24.** The NDP recites its purpose as the setting of "investment priorities that will underpin the successful implementation of the NPF" and describes itself as a "budget and financial plan", and provides expressly that it is not part of a physical planning process but as being "fully

integrated with the approach adopted in the National Planning Framework to spatial planning", as it sets out how funding will be made available for certain projects considered essential to the achievement of the strategic outcomes identified in the NPF.

**25.** The NDP identifies major infrastructure works it proposes to fund such as railway, road and airport infrastructure.

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

**27.** The question that arises is whether, because the NDP makes, in some cases, quite specific provision to support the delivery of certain strategic objectives identified in the NPF by what was called an "indicative" allocation of resources for large-scale infrastructure projects, all which are expressly identified as compatible with and supportive of the objectives of the NPF, the NDP is required to be assessed under the SEA Directive. The plans are linked, and together set the framework, most obviously in transport infrastructure, to further the spatial development strategy provided in the NPF.

**28.** The appellant says that while the NDP is described as a budget or financial plan, and would be outside the SEA Directive for that reason, it should have been subject to assessment under the SEA Directive because it was developed with, and cross refers to, the NPF and is a plan by which the infrastructure described in the NPF is proposed to be delivered. Further, it is argued that as NDP makes strategic choices around types of projects, for example, road rather than rail is preferred for connectivity, and it provides for the allocation of resources to meet that objective, the effect of the NDP is to foreclose an alternative allocation of the resources for the strategic developments. It is argued that the level of integration with the NPF means

the NDP cannot be treated as a standalone budgetary plan and it supplements in material respects that plan.

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

**30.** The Court of Appeal regarded the NDP as falling outside the scope of the SEA Directive because it did not meet the requirements of Article 3, and also because it was excluded on the basis of it being a budgetary plan. It did not address the question now arising of whether the range of projects specifically identified, including specific road projects, new road developments or improved or upgraded rural roads, which were not identified in the NPF, do require an environmental assessment. It noted that all such individual projects, in any event, are subject to the planning process and to Appropriate Assessment and Environmental Impact Assessment and assessment as to habitats for protected flora and fauna as EU law already requires.

**31.** The question of whether the NDP is a budgetary plan and thus exempted under article 3(8) and (9) is a separate question from that raised above, and this Court noted the observation made by the CJEU in *Bund Naturschutz in Bayern* that the requirement in Article 3(2)( a) of the Directive:

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

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

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

**34.** The correct approach to this question is likely to be influenced by the response to the request for clarification on the scope of the Directive, but a further question arises with regard to the NDP, *viz.* whether the fact that the NDP was adopted to support the NPF is a sufficient basis to treat it as a plan or programme itself requiring a Strategic Environmental Assessment, notwithstanding that it is a plan framed as a budgetary or financial plan.

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

**36.** This Court therefore proposes to ask a second question as follows:

**"2(a): Must Article 3(1) read in conjunction with Article 3(8) and (9) of the SEA Directive be interpreted to mean that a plan or programme which makes specific, albeit described as "indicative", provision for the allocation of funds to build certain infrastructure projects with a view to supporting the spatial development strategy of another plan, itself forming the basis of downstream spatial development strategy, could itself be a plan or programme within the meaning of the SEA Directive?**

**2(b): If the answer to 2(a) is yes, does the fact that a plan which has as its objective the allocation of resources, mean that it must be treated as a budgetary plan within the meaning of article 3(8)?"**

**The Third Issue and Conclusion of this Court: the Assessment of Alternatives**

**37.** The second strand of the appeal concerns the methodology engaged by the respondents in the assessment of the NPF and whether it is in conformity with the approach for which provision is made in Article 5(1) and Annex I of the Directive, if applicable.

**38.** An environmental assessment was carried out in Chapter 7 of the 'Strategic Environmental Assessment Environmental Report – Ireland 2040: The National Planning Framework' ("The Environmental Report") which identified five reasonable alternatives for an overall strategic planning framework. By reason of Article 5(1) of the Directive, each of those five reasonable alternatives was required to be described, identified and evaluated.

**39.** The options then were assessed within a matrix which used the plus and minus indicators for each of the six options. The preferred approach was the macro-spatial growth approach because it provided for regional clarity, concentration towards cities and some regionally important larger settlements, contained growth and reduced sprawl, and sequential

provision of infrastructure with some critical infrastructure being put in place to promote investment. The reasons for choosing this option were explained in the environmental report.

**40.** The preferred option was dealt with in some detail in Chapter 8 and assessed for its possible environmental effects and Chapter 9 dealt with possible mitigation measures to offset any significant adverse effects on the environment of the adoption of that option.

**41.** The issue concerning the assessment of reasonable alternatives addressed on the appeal to this Court concerns whether the reasonable alternatives were sufficiently identified, described and evaluated on a correct basis to the analysis carried out in regard to the preferred option. The Court of Appeal concluded that assessment met the requirements of the Directive.

**42.** The appellant says that once a number of options were expressly found to be reasonable, they had to be assessed at the same level and on the same basis as the preferred option, and that is the means by which an assessment, described by the appellant as "comparable" is to be conducted. The appellant argues that all five reasonable alternatives were to be assessed with the same degree of scrutiny, and on the same basis as that afforded to the preferred option, and that this is the approach mandated by Article 5(1) and the correct means by which a proper comparison can be made between those alternatives.

**43.** On a simple quantitative analysis, the appellant points to the fact that the 57 pages of text in Chapter 8 which contained the analysis of the preferred option is very different from the short narrative statement and blunt matrices used in Chapter 7 to evaluate and describe the reasonable alternatives.

**44.** The respondents contend for an iterative approach so that, while an assessment of reasonable alternatives and the preferred option does have to be carried out, the level of scrutiny will depend on the relevant stage of the process at which this is done. The respondents argue that the assessment of the likely significant environmental effects of the draft plan does require a high level of scrutiny, but that a lesser degree of scrutiny is appropriate with regard to the

reasonable alternatives and that this is apparent from the fact that alternatives are discarded at different stages of the process. The respondents argue that once five options had been identified as reasonable alternatives, it was sufficient to apply a degree of assessment to each of these, and that the Directive did not preclude a more intense level of scrutiny of the preferred option once this was identified. They argue that the Article 3(2) of the Directive in its terms envisages that it is the draft plan that is to be comprehensively assessed for environmental impact, and that does not require that all reasonable alternatives, considered as possible other means to achieve the strategic ends for which the plan provides, are to be afforded an identical treatment to that afforded to the preferred option.

**45.** It is suggested that the highest degree of scrutiny therefore is to be applied to the preferred option in respect of which a "full assessment" is required and that this is evident from the fact that the Strategic Environmental Assessment is a process which requires first, the ascertainment of reasonable alternatives, then the comparison of those to arrive at a preferred option, and at that point a full assessment of the likely significant environmental effects of that option is to be performed.

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

**47.** Having reviewed the text of the Directive, the Commission Guidance (entitled "Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment")and certain authorities from the Courts of England and Wales, this Court considered that, whilst the Directive did envisage an iterative approach to the selection of alternatives, the methodology to be engaged in the description and evaluation of the reasonable alternatives and the preferred option, and whether in particular an

equally or broadly similar or comparable assessment was required to be performed in regard to the reasonable alternatives and the preferred option, was not *acte clair*.

**48.** This Court referred to the purpose of the SEA Directive and the central role played in decision-making by an informed public consultation regarding the selection of the preferred option, as an environmental report is aimed at contributing to more sustainable solutions in decision-making. This Court said that as the environmental assessment must be performed during the preparation of the plan or programme, and before its adoption, by reason of Article 4(1), this would suggest that a comparable analysis be carried out of the alternatives judged to be reasonable so that the consultees may engage an informed scrutiny of the preferred option.

**49.** This Court also noted that if the requirements of assessment and consultation are to be read in conjunction with the Aarhus Convention (The Convention on Access to Information Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus 25 June 1998), then it might be argued that consultation can best occur, or perhaps can only properly occur, if a sufficient degree of assessment is carried out of alternatives which are identified as reasonable, and if those alternatives are submitted to a broadly similar degree of scrutiny as that afforded to the preferred option, so that the likely environmental impact of the preferred option can properly be tested and understood in the light of the information on the likely environmental effects of other reasonable alternatives that might achieve the same broad strategic end. In that regard, the respondents argued that this approach to assessment might necessitate the preparation of multiple plans, something which could have significant practical consequences for plan-making authorities.

**50.** The Court went on to comment that it could perhaps be argued that the preparation of a more detailed analysis of a preferred option before the consultation process is concluded, and before a plan is finally adopted, could have the effect of operating as a kind of gravitational pull towards that preferred option at too early a stage in the process. The observations from

the consultees could be, and possibly almost always would be, more focused and clearer in regard to the preferred option where a greater deal of detail is available as to its likely environmental impact.

**51.** The further question arises is whether the approach for which the appellant contends is neither practical nor feasible, and would impose unduly onerous and unworkable obligations.

**52.** This Court observed on the other hand that the plain text of Article 3(1) of the Directive which requires that an environmental assessment in accordance with Articles 4 to 9 shall be carried out for plans and programmes likely to have significant environmental effects, could lead to a conclusion that the obligation to carry out a full Strategic Environmental Assessment can arise only in respect of a plan or programme, i.e., once that plan or programme has ascertained and identified the preferred option.

**53.** The text of the Directive does not provide an answer, as a plain reading could suggest that whilst an SEA assessment must be carried out in respect of a draft plan, but what is not clear is whether an assessment of a particular level of detail is required for all potential reasonable alternatives identified in a draft plan submitted for consultation before a plan is finally adopted. It is also unclear whether it is appropriate, or simply superfluous, that a greater degree of scrutiny is engaged in the assessment of a preferred option than that engaged in regard to the reasonable alternatives.

**54.** This Court therefore proposes to ask a third question as follows:

> **"3(a): Must Article 5, and Annex 1, of the SEA Directive be interpreted to mean that where an environmental assessment is required under Article 3(1), the environmental report for which provision is made therein should, once reasonable alternatives to a preferred option are identified, carry out an assessment of the preferred option and the reasonable alternatives on a comparable basis?**

**3(b): If the answer to question (a) is yes, is the requirement of the Directive met if the reasonable alternatives are assessed on a comparable basis prior to the selection of the preferred option, and thereafter the draft plan or programme is assessed and a more complete SEA assessment then carried out in regard to the preferred option only?"**