FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 10
XA11/25

Lord President
Lady Wise
Lord Ericht

OPINION OF THE COURT

delivered by LADY WISE

in the appeal under section 239 of the Town and Country Planning (Scotland) Act 1997

by

RAESHAW FARMS LIMITED

Appellant

against

SCOTTISH MINISTERS

Respondents

and

ENERGIEKONTOR UK LTD

Interested Party

Appellant: J de C Findlay KC, K Young; Murray Beith Murray LLP
Respondent: Crawford KC, McLean (sol adv); Scottish Government Legal Directorate
Interested Party: Burnet KC, McKenna; CMS Cameron McKenna Nabarro and Olswang LLP

17 February 2026

Introduction

[1] This statutory appeal raises the issue of whether an application for planning consent for a renewable energy project, a wind farm, was lawfully granted in circumstances where

the connection of the wind farm to the grid was not included as part of the application. The issue which arises is whether the construction of the wind farm and its grid connection constitute a single project for the purpose of assessing its environmental impact. Allied to that is the question whether the decision maker's evaluation of that issue was sufficiently reasoned and fact specific.

[2] On 15 December 2022, the interested party, a renewable energy development company, submitted a planning application to Scottish Borders Council for the erection of eight wind turbines and associated infrastructure, to be sited about 1.3 kilometres to the northeast of the village of Heriot and to be known as Wull Muir Wind Farm. The appellant operates a farm and estate close to the proposed wind farm development and objected to the application, which was initially refused. On an appeal by the interested party, the respondents, Scottish Ministers, appointed a reporter, who issued a decision on 14 January 2025 to grant planning permission subject to various conditions. That decision is challenged in this appeal.

The statutory context

[3] The source of the applicable law in this area is EU Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the 2011 Directive), as amended by Directive 2014/52/EU, which codified EU law on this issue following successive amendments of the predecessor Council Directive 85/337/EC. Both Directives have sought to ensure that the likely environmental impacts of any major project are considered and assessed before permission for development is granted. Recital (2) in the preamble to the 2011 Directive emphasises that "[e]ffects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-

making processes." "[P]roject" is defined in Article 1 as "the execution of construction works or of other installations or schemes" and "other interventions in the natural surroundings and landscapes…".

[4] Article 3(1) provides that every environmental impact assessment ("EIA") shall "identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project" on a range of environmental factors, including (a) population and human health; (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC; (c) land, soil, water, air and climate; (d) material assets, cultural heritage and the landscape; (e) the interaction between the factors referred to in points (a) to (d).

[5] In Scotland, the 2011 Directive is implemented by the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/102). EIA development is defined by reference to Schedules I and II of the Regulations. Installations for the harnessing of wind power for energy production involving more than two turbines with a height of on or over 15 metres are specified as being Schedule 2 development (Schedule 2, Category 3 subparagraph (j)). Regulation 2 defines EIA development as including "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location". It is accepted by all parties that the interested party's proposed scheme constitutes EIA development.

[6] Regulation 3 of the 2017 Regulations provides that "[t]he planning authority or the Scottish Ministers, as the case may be, must not grant planning permission for EIA development unless an environmental impact assessment has been carried out in respect of that development and in carrying out such assessment the planning authority or the Scottish Ministers, as the case may be, must take the environmental information into account."

[7] In terms of regulation 4, an environmental impact assessment is a process that involves the preparation by the developer of an EIA report, which is publicised and then examined by the decision maker, who must reach a reasoned conclusion on the significant effects of the development on the environment. The factors to be identified, described and assessed are effectively those listed in Directive 2011/92/EU. Specific reference is made to Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive) and Directive 2009/147/EC of the European Parliament on the conservation of wild birds (the Birds Directive). In terms of regulation 4(5), the assessment must identify the likely significant effects of the proposed development on the environment before a decision to grant planning permission for that development is made. Exceptions to that are found in regulation 4(6) where the decision makers "(a) consider that the likely significant effects of the development on the environment are not fully identifiable at the time of their determination of the application for planning permission; and (b) are minded to grant planning permission for EIA development subject to a multi-stage condition."

[8] Regulation 5 prescribes the information that must be included in the EIA report and Part 5 of the Regulations details the requisite publicity and procedures on their submission. There is a specific regime involving applications for multi-stage consent under Part 8.

[9] In England and Wales the Directive is now implemented through the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571), which replaced the previous Regulations passed in 2011 (SI 2011/1824). As one would expect, the Scottish Regulations commenced simultaneously with and are in near identical terms to those applicable in England and Wales. In both sets of Regulations, the term "development" is used throughout in place of the term "project" employed in the 2011 Directive.

[10] There are a number of legal routes governing the connection of works such as those proposed by the interested party to the grid. These include an application for deemed planning permission as part of an application for consent to the installation of overhead electric lines under section 37 of the Electricity Act 1989, or an application for planning permission under the Town and Country Planning (Scotland) Act 1997 or as a result of the exercise of permitted development rights under The Town and Country Planning (General Permitted Development) (Scotland) Order 1992.

The interested party's application and associated EIA

[11] A previous application by the interested party had been refused on landscape and visual grounds and the subsequent application addressed that by proposing a site further southeast. The December 2022 application was for the construction of eight wind turbines with a maximum tip height of 149.9 metres, formation of access tracks, a borrow pit, temporary construction compound, erection of a control building, onsite substation and associated infrastructure with an energy storage compound. Accordingly, it related only to the construction of the turbines and associated infrastructure and not the future grid connection.

[12] As the proposed development fell within Schedule 2, Category 3 of the 2017 Regulations, the focus of the interested party's EIA was the assessments undertaken to identify the potentially significant environmental effects of the proposed development during the complete development lifecycle. The proposed development was considered capable of being able to provide up to 36MW of installed capacity, depending on the turbine model chosen. It was further estimated that this could generate approximately 150 GWh of renewable electricity each year. The renewable electricity generated by the proposed

development could power over 38,000 homes on average each year. The report described the principal elements of the development as including the proposed substation. That substation would house the switchgear and control equipment required for the grid connection and would also provide some secure storage space that might be required occasionally for the wind farm. An off-site grid connection would be necessary to take the power generated from the wind turbines into the local electricity distribution network. The final details of the grid connection, including the precise route and an assessment of any impacts on the environment, would be determined by the local Distribution Network Operator (DNO) at a later date and might be subject to a separate design and consent process.

[13] The capacity of the local grid network to accept the likely output from a proposed wind farm was assessed as critical to the technical feasibility of the development. It was acknowledged that connection voltage and distance from the turbines could have a significant effect on the commercial feasibility of the development proposal. The interested party had consulted with the local DNO to accommodate the electricity generated by the proposed development.

The reporter's decision

[14] In allowing the interested party's appeal and granting planning permission, the reporter recorded the requirement to determine the appeal in accordance with the development plan, unless material considerations indicated otherwise. The fourth National Planning Framework (NPF4) was highly supportive of onshore wind energy developments, and the Scottish Borders Local Development Plan (the LDP) indicated a similarly supportive approach. The main issues in the appeal were (i) the proposal's landscape and visual effects,

(ii) its renewable energy and climate change benefits and (iii) the socio-economic benefits. While (i) was addressed in detail in the decision, that aspect has no bearing on the appeal to this court.

[15] The reporter attached "positive weight" to the renewable energy and climate change benefits of the proposal. By the time of the decision, the interested party had a contracted grid energisation date of October 2028, so he concluded that the proposal "would make a worthwhile and relatively early contribution to Scottish Government targets for the supply of renewable electricity and the reduction in greenhouse gas emissions". The objectors' arguments that the development could result in there being over-capacity such that there was no need for the electricity it would provide were given "very little weight".

[16] On socio-economic effects, the reporter recorded the prediction in Chapter 14 of the EIA that "the construction phase of the proposal" would generate 60 jobs and £3.5 million GVA into the Scottish Borders economy, with a further 64 jobs and £3.7 million GVA in the wider Scottish economy. He decided that there was no evidence to support the fears of the local community council that there would be negative socio-economic consequences due to a reduction in the area's attraction to tourists. Under reference to part c) of NPF4 policy 11, he was satisfied that the proposal would achieve its objectives of maximising net economic impact, including local and community socio-economic benefits such as employment, associated business and supply chain opportunities.

[17] The decision addressed the grid connection issue that is key to the present appeal in the following terms (at paragraph 129):

> "An objector asserts that, as the appellant has not detailed the grid infrastructure that will be necessary to connect the proposal, it is impossible for the full environmental effects of this proposal to be assessed. I disagree. Whatever grid connection solution is ultimately proposed will (if it requires planning permission) be subject to its own evaluation. It is not part of the current proposal. The objectors (*sic*) reference to the

> term "salami slicing" is misdirected. That properly refers to an attempt to circumvent the objectives of the EIA Directive and regulations by dividing what is in reality a single project into separate parts. In this instance, there has been no attempt to avoid the need for an EIA. The development proposal has been subject to EIA in the normal way and if a subsequent proposal for a grid connection were EIA development, that too would require to be assessed in accordance with the EIA regulations".

Relevant case law involving the 2011 Directive and its predecessor

[18] The issue of project splitting in the context of assessing likely environmental effects has been the subject of litigation before the Court of Justice of the European Union, in the courts of some Member States of the EU and in the UK courts. Each of the parties selected passages from some of the judgments to support their argument. What follows is a summary of those that have a bearing on the core contention in this case.

(i) CJEU decisions

[19] In *Bund Naturschutz* v *Freistaat Bayern* (Case C-396/92) [1994] ECR I-3717, development consent for two sections of an express road had been given after the time limit for implementing Council Directive 85/337/EEC (assessment of the effects of certain public and private projects on the environment) and without an assessment of the projects' effects on the environment. The German court referred the issue of whether that State's transitional provisions accorded with the Directive. It posed an additional question about the concept of a "project" and whether an EIA should be carried out for the entire road link planned or only for the sections in respect of which consent was sought. Advocate General Gulmann provided a detailed opinion for the court, in which he analysed the obligation under the 1985 Directive to carry out environmental impact assessments before any consents were granted. On the issue of defining the project, he considered (at paragraph 71) whether:

> "in connection with the environmental impact assessment of the specific project, there is an obligation to take account of the fact that the project forms part of a larger project, which is to be carried out subsequently, and in the affirmative, the extent to which account is to be taken of that fact"

and concluded that

> "The subject-matter and content of the environmental impact assessment must be established in the light of the purpose of the directive, which is, at the earliest possible stage in all the technical planning and decision-making processes, to obtain an overview of the effects of the projects on the environment and to have projects designed in such a way that they have the least possible effect on the environment, That (*sic*) purpose entails that as far as practically possible account should also be taken in the environmental impact assessment of any current plans to extend the specific project in hand".

He added (at paragraph 72):

> "For instance, the environmental impact assessment of a project concerning the construction of the first part of a power station should, accordingly, involve the plans to extend the station's capacity fourfold, when the question of whether the power station's site is appropriate is being assessed. Similarly, when sections of a planned road link are being constructed, account must be taken, in connection with the environmental impact assessment of the specific projects of the significance of those sections in the linear route to be taken by the rest of the planned road link."

The opinion accordingly supported a general rule that the impact of anticipated future works should be included within the environmental impact assessment for a project. However, the ECJ's decision was ultimately restricted to the time limits issue.

[20] The ECJ subsequently considered the question of defining a project for the purposes of the 1985 Directive in the landmark case of *Commission* v *Spain* (Case C-227/01) [2005] Env LR 20; [2004] ECR I-8253, which involved the question of whether a new by-pass line which was part of a larger railway project could be regarded as "a mere modification to an existing project" for the purposes of the 1985 Directive. The court made clear that it was impermissible to split up or "salami slice" projects into a number of shorter sections as that would undermine the basic objective of the 1985 Directive. In assessing lawful implementation of the 1985 Directive, it was "the significant effect that a particular project is

'likely' to have on the environment" that had to be considered. A broad view should be taken of what constituted the scheme or project for which development consent was sought and of how environmental effects might arise.

[21] The specific issue of the relationship between defining the scope of the project and the necessary environmental impact assessment was considered in *Umweltanwalt von Kärnten* v *Kärntner* (Case C-205/08) [2010] Env LR 15; [2009] ECR I-11525. After summarising the relevant case law the court stated expressly that "...the failure to take account of the cumulative effect of several projects must not mean in practice that they all cease to be covered by 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 Directive 85/337".

(ii) Decisions from the UK jurisdictions

[22] Two Scottish decisions have considered the scope and extent of EIA reports in the context of the legitimacy of separating a project into more than a single element. The first, *Skye Windfarm Action Group* v *Highland Council* [2008] CSOH 19 concerned a windfarm application that raised complex environmental and nature conservation issues. In challenging the grant of planning permission to the wind farm and associated borrow pits, the local action group argued, amongst other matters, that the environmental statement (the precursor to an EIA report under previously applicable Regulations) was defective in its initial exclusion from consideration of the effect of the borrow pits. In rejecting that challenge the Lord Ordinary (Hodge) concluded (at paragraph [76]) that:

> "It is undisputed that the borrow pits formed an integral part of the wind farm development and *Swale Borough Council* [*R* v *Swale Borough Council, ex p Royal Society for the Protection of Birds* [1991] 1 PLR 6] and *BAA plc* [*BAA plc* v *Secretary of State for*

> *Transport, Local Government and the Regions* [2003] JPL 610] support the view that a part of a development in such circumstances should not normally be considered in isolation. But I am not satisfied that it was illegal to separate the borrow pits from the assessment of the wind farm. The initial assessment in 2002 and the August 2006 assessment did not identify any significant environmental effects of the borrow pits whether considered alone or cumulatively with the wind farm. It is consistent with Advocate General Gulmann's approach in *Bund Naturschutz* 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. While, as Mr Campbell argued, the cumulative effects of the wind farm and the borrow pits are commutative, I see no practical reason for an environmental impact assessment of the borrow pits other than in the context of the wind farm application".

[23] More recently, the Lord Ordinary (Doherty) addressed the issue in *Wildland* v *Highland Council* [2021] CSOH 87; 2022 SLT 1082. That case involved a decision to grant planning permission for the construction of a vertical launch space port with launch operations control centre, site integration facility, launch pad complex, antenna park, access road, fencing, services and associated infrastructure. The proposed development would be known as Space Hub Sutherland (SHS), with the site boundary overlapping five designated sites, including a Special Area of Conservation, a Special Protection Area and two Sites of Special Scientific Interest.

[24] One of the challenges made in the judicial review of the planning decision was that the relevant EIA report had not considered the environmental impacts of the proposed visitor facilities on the site. In rejecting the contention that this was an error of law, the Lord Ordinary expressed the view that the case was not one of impermissible salami slicing of a project which ought to have been assessed as a single development. There had been a rational justification for not identifying the proposed location of the visitor facilities and not applying for permission to develop them initially. The size of the launch exclusion zone had not yet been clarified, so there was obvious uncertainty about the appropriate locations for a visitor viewing area or car parking. The Lord Ordinary also noted (at paragraph [20]) that

"Development of the visitor facilities will require a further application for planning permission. At that stage the cumulative environmental impact of SHS and the visitor facilities will require to be assessed".

[25] The issue of what constitutes the "project" for the purposes of the EIA Regulations for England and Wales (Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) read with the 2011 Directive was given detailed consideration by Lang J in *R (Wingfield)* v *Canterbury City Council* [2020] JPL 154. That case involved planning permission for a mixed-use development of dwellings and a variety of civic spaces, including a community ecological park and associated infrastructure on a number of designated sites. The claimant alleged that the local authority had erred in failing to treat the development of two of the relevant sites as a single project for the purposes of the EIA Regulations. Lang J reviewed the relevant domestic authorities (*Bowen-West* v *Secretary of State for Communities and Local Government* [2012] EWCA Civ 321; [2012] JPL 1128, *R (Burridge)* v *Breckland DC* [2013] EWCA Civ 228; [2013] JPL 1308, *R (Larkfleet Ltd)* v *South Kesteven DC* [2015] EWCA Civ 887; [2016] Env LR 4) and the CJEU's repeated enjoinder that the purpose of the 2011 Directive cannot be circumvented by the splitting of projects (*Ecologistas en Acción* v *Ayuntamiento de Madrid* (C-142/07) [2009] PTSR 458; [2008] ECR I-6097 at paragraphs 44-45).

[26] Having concluded that the question as to what constitutes the "project" for the purposes of the EIA Regulations is a matter of judgement for the competent planning authority, subject to challenge on grounds of *Wednesbury* rationality or other public law error, Lang J compiled (at paragraph 64 the following non-exhaustive list of relevant factors for consideration of the issue:

> "• Common ownership: Where two sites are owned or promoted by the same person, this may indicate that they constitute a single project (*Larkfleet* at [60]).
>
> • Simultaneous determinations: Where two applications are considered and determined by the same committee on the same day and subject to reports which cross refer to one another, this may indicate that they constitute a single project (*Burridge* at [41] and [79]).
>
> • Functional interdependence: Where one part of a development could not function without another, this may indicate that they constitute a single project (*Burridge* at [32], [42] and [78]).
>
> • Stand-alone projects: Where a development is justified on its own merits and would be pursued independently of another development, this may indicate that it constitutes a single individual project that is not an integral part of a more substantial scheme (*Bowen-West* at [24]– [25])."

Applying those factors to the facts of *Wingfield*, the two sites in that case were found to constitute separate developments and were not part of a single project.

[27] The Court of Appeal of England and Wales has given recent consideration to the issue of what constitutes a stand-alone project in this context. In *R (Ashchurch Rural Parish Council)* v *Tewkesbury BC)* [2023] EWCA Civ 101; [2023] Env LR 25, a large-scale housing development required the construction of a road bridge over a main railway line and connecting roads to provide access to the land involved in phase 1 of the development proposal. The EIA report treated the bridge as a stand-alone project to be given consideration independently from any environmental assessment of the highway and residential development it would facilitate. In allowing an appeal against an unsuccessful judicial review of the decision to grant the planning application, the court emphasised (at paragraph 74) the need to understand the term "project" "broadly, and realistically".

[28] Citing *R (Finch)* v *Surrey County Council* [2022] EWCA Civ 187; [2022] Env LR 27, Andrews LJ confirmed that the "decision-making authority should consider 'the degree of connection… between the development and its putative effects' and whether a particular

consequence is 'truly an effect'". Following consideration of the relevant authorities Andrews LJ stated (at paragraph 78) that:

> "The identity of the 'project' for these purposes is not necessarily circumscribed by the ambit of the specific application for planning permission which is under consideration. The objectives of the Directive and the Regulations cannot be circumvented (deliberately or otherwise) by dividing what is in reality a single project into separate parts and treating each of them as a 'project' – a process referred to in shorthand as 'salami slicing'..."

At paragraph 81, the court supported the view of Lang J in *Wingfield* that the question as to what constitutes the "project" is a matter of judgement for the competent planning authority, subject to challenge on grounds of *Wednesbury* rationality or other public law error. The non exhaustive list of potentially relevant criteria was given specific approval.

[29] The issue of the relationship between connected projects was revisited in *R (Together against Sizewell C Ltd)* v *Secretary of State for Energy Security and Net Zero* [2023] EWCA Civ 1517; [2024] Env LR 22, albeit in a different context. That case involved a claim that the Secretary of State had erred in failing to carry out an "appropriate assessment" of the effects on European sites of the permanent supply of potable water to a proposed nuclear power station, either as part of the same project or cumulatively as a separate but connected project, under regulation 63 of the Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) ("the Habitats Regulations"). The challenge was to the Sizewell C (Nuclear Generating Station) Order 2022 (SI 2022/853) authorising the construction, maintenance and decommissioning of a third nuclear power station at Sizewell on the Suffolk coast. Two questions arose at the appellate stage – (i) had the Secretary of State erred in law in treating the permanent supply of potable water necessary for the operation of the power station as not part of the same project for the purposes of assessment under the Habitats Regulations? And (ii) if it was correct to regard it as a separate project, had the Secretary of State erred in

failing to carry out, under those Regulations, a cumulative assessment of its effects together with those of the power station itself?

[30] Lindblom LJ, in giving the court's judgment upholding the first instance decision of Holgate J that the Secretary of State had not erred on either matter, expressed the following view (at paragraphs 60-61):

> "A further principle, also well established, is that two connected projects may proceed separately, and their cumulative effects be assessed, whether under the EIA Regulations or under the Habitats Regulations, either in two stages or at the second, but as soon as those cumulative effects can be identified for meaningful assessment (see the judgment of Sales L.J., as he then was, in *Larkfleet* , at paragraphs 36 to 38, and also his judgment in *R. (on the application of Forest of Dean (Friends of the Earth)) v Forest of Dean District Council*, [2015] PTSR 1460 at paragraphs 13 to 19). A 'staged approach' to assessment is, in principle, legitimate and will prevent what has been described as 'sclerosis in the planning system' (see the judgment of Sales L.J. in *Forest of Dean District Council*, at paragraph 18).
>
> In some cases this will be the obvious and only realistic course to take. It can enable the first project to receive the permission or consent it requires, without preventing or prejudicing a proper assessment of likely cumulative effects".

[31] Under reference to *Ashchurch,* the court also emphasised (at paragraph 68) that determining the nature and scope of a particular project and whether two or more developments are properly to be regarded as a single project were not matters of law for the court but of fact and evaluative judgement for the decision maker itself. That evaluation is subject to review by the court on a conventional *Wednesbury* basis.

[32] Finally in this section we note that the UK Supreme Court, by a majority allowed an appeal against the decision of the Court of Appeal in *R (Finch* v *Surrey County Council)* - [2024] UKSC 20; [2024] 4 All ER 717. The local authority's decision to grant planning permission in that case to extract petroleum was unlawful because the EIA had failed to assess the effect on climate of the combustion of the oil to be produced and because the reasons for disregarding that effect were flawed. The *Kilkenny Cheese* case (discussed at

paragraph [40] below) is referred to in both the majority and dissenting judgments, albeit not on a point of direct relevance to the present case. Of more direct application is the part of the Supreme Court's judgment (paragraphs 61-64) that discuss interpretation of the 2011 Directive generally, such as the need to examine the language and in particular the purpose of the 2011 Directive. Further, it is essential to the validity of the decision under challenge that, before it is made, there has been a systematic and comprehensive assessment of the project's likely significant effects on the environment. Public participation is integral to the process of assessment.

(iii) Decisions from the Republic of Ireland

[33] The issue of the separation of the construction of wind farms from their connection to the grid for the purposes of EIA assessment has been specifically considered on several occasions in the Irish courts. *Ó Grianna* v *An Bord Pleanála* [2014] IEHC 632 involved an application for judicial review of a local authority's decision to grant planning permission for the erection of six wind turbines and associated infrastructure. The permission did not relate to grid connection works. Peart J decided that the failure to have regard to the cumulative effect of the entire development, including the grid connection works when carrying out the EIA was an error, having regard to the requirements of the 2011 Directive. The turbine development and grid connection was "one project, neither being independent of the other" as "[t]he 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."

[34] Lord Hodge's decision in the *Skye Windfarm* case was analysed in some detail by Peart J (at paragraphs 24-26). The Scottish case was found to be distinguishable from the situation in *Ó Grianna*, partly on the basis that in *Skye Windfarm* there had been an assessment made at an earlier screening stage that there were no significant environmental impacts deriving from the borrow pits such that a cumulative assessment was required. Further, the authority requested the developer to provide a cumulative assessment, and that was provided and considered. The case was not considered to be 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 avoiding a cumulative assessment of significant environmental effects of both. Each case would have to be considered in the light of its own specific facts.

[35] The factual matrix in the subsequent case of *Daly* v *Kilronan Windfarm Limited* [2017] IEHC 308 was different from that in *Ó Grianna.* There, planning permission had been granted for the primary windfarm development, with a specific condition that it was not to be construed as including any consent or agreement to connection of the windfarm to the national grid. The developer had initially anticipated that the grid connection would be overhead but subsequently decided to accept an offer of an underground cable connection which was to pass through three separate counties. A local farmer sought an order prohibiting the relevant works for a trench and the laying of the cables on the basis that it was unauthorised development in term of domestic legislation. The developer contended that the works to be carried out were exempt from the requirement to secure planning permission and that no EIA was required for them. Baker J, then sitting in the High Court, considered the effect of the decision in *Ó Grianna*, but also analysed the European jurisprudence. She was not convinced that it could be said in absolute terms that the only

permissible way in which a planning application for a windfarm could be made was by application for the whole project to include the grid works as there were a number of ways in which an assessment of the entire project could be carried out (paragraphs 44-45). The key, however, was that an EIA was required for the whole project and so no individual part could be separated and treated as a stand-alone planning exempt element (paragraph 46).

[36] Under reference to Advocate General Gulmann's opinion in *Bund Naturschutz* and the decisions in *Commission* v *Spain* and *Umweltanwalt von Kärnten* referred to at paragraphs [20]-[21] above, Baker J concluded (at paragraph 54) that:

> "As a matter of European law the assessment of whether the grid connection works can be treated as exempted development is one that must be considered in the context of a reading that best achieves the aims and objectives of the EIA Directive. I consider that on account of the fact that the grid works cannot be lawfully separated from the project as a whole, that to treat the grid works as exempt fails to give effect to this principle."

Accordingly, an EIA assessment in the context of the project as a whole was required. Even where part of a project, taken alone, could easily come within an exemption from the need for planning permission, the court should not reach a conclusion that had the effect that a project could be impermissibly split (paragraph 59). Ultimately the question of whether an EIA was required was for the planning authority.

[37] The matter of how such projects should be approached for the purpose of EIAs and compliance with the 2011 Directive was addressed more recently by the High Court in the case of *Sweetman* v *An Bord Pleanála* [2023] IEHC 89, a judgment of Quinn J. There it was claimed that an order declaring that the construction of a grid connection between a wind farm development and an electricity substation was exempted development was in breach of the 2011 Directive and contrary to both domestic and CJEU jurisprudence. A screening exercise had determined that the grid connection works did not require an EIA because of

the specific characteristics and location involved and the absence of any likely significant environmental impacts, whether viewed alone or cumulatively with the windfarm. Again the relevant domestic authorities were examined and Quinn J noted (at paragraph 174 under reference to *Daly)* that there could be successful consent applications each requiring an EIA, but the EIA itself must assess the entire project and its cumulative effects.

[38] The absence of any European authorities concerning the particular question of windfarms and their grid connections was noted. Quinn J considered that the decisions of Peart J in *Ó Grianna* and Baker J in *Daly* "could not be clearer" and derived the following conclusions from them:

> "(a) Construction of a wind farm and its grid connection works is one project, neither being feasible or serving any purpose without the other.
>
> (b) Where environmental impact assessment of a wind farm project is required, as is the case for a windfarm having more than five turbines, that EIA must comprise an assessment of the entire project (windfarm and grid connection) and not part thereof.
>
> (c) Separate phases of a project may be subject to separate consent applications or s. 5 referrals, but an EIA which does not assess the entire project does not comply with the Directive. Screening for EIA of any part of the project does not meet his (*sic*) requirement.
>
> (d) Since the gridworks cannot be lawfully separated from the project as a whole, when the windfarm comprises more than five turbines and therefore requires a mandatory EIA, to treat the grid works as exempt is contrary to the aims and objectives of the Directive.
>
> (e) No matter what level of detail is contained in screening and environmental reports …. relating to grid connection works, in such a case the screening … is still only screening and not a compliant EIA."

Quinn J reiterated that, although every case must be examined on its on facts, the conclusions drawn from *Ó Grianna* and *Daly* were on point and so were directly applicable.

[39] The rationale that an EIA which does not assess construction of a windfarm and connection to the grid as one scheme offends the rule against project splitting as it applies to

wind farm projects in Ireland has been consistently followed in subsequent and related cases, including *North Westmeath Turbine Action Group* v *An Bord Pleanála* 2025 IEHC 608.

[40] In a decision of the Supreme Court of Ireland, *An Taisce – The National Trust for Ireland* v *An Bord Pleanála (Kilkenny Cheese Ltd, Notice Party)* [2022] IESC 8; [2022] 2 IR 173, Peart J's decision in *Ó Grianna* was cited (at paragraphs 82- 85), albeit *obiter,* as an example of where a "clear and unbreakable inter-relationship between the project itself and certain off-site activities" for the purpose of assessing environmental consequences had been clearly established. It was accepted by both parties in *Kilkenny Cheese,* which concerned the climate change impact of the increase in milk production for a cheese factory, that the off-site milk production was "not part of the project itself", so the ratio of the case is not directly in point. For completeness we note that the decision in *Ó Grianna* is mentioned in paragraph 309 of the dissenting judgment of Lord Sales in *Finch* (cited above at paragraph [32]), albeit in a different context.

(iv) A decision of the High Court of Galicia, Spain

[41] At the request of the court, parties searched for decisions from any other EU states that may have considered project splitting in this context. A recent decision of the High Court of Galicia was discovered and translated – *Asociación Ambiental e Cultural Petón do Lobo* v *Dirección Xeral de Planificación Enerxética e Recursos Naturais* (*Do Lobo Environmental and Cultural Association* v *Directorate General of Energy Planning and Natural Resources*), Judgment 00368/2025. It involves an appeal related to a wind farm known as "A Ruña III". One of the challenges was to the separation of the construction project and the relative power line in the consideration of the environmental impacts leading to authorisation of the scheme. The court concluded that the wind farm project consisted of both the wind turbines and the

production of electrical storage that is fed into the grid. Accordingly, in that particular application, the different components should not have been considered separately but together, in a single environmental impact statement.

The challenges to the reporter's decision: Analysis and Decision

[42] The appellant advances four grounds of challenge relating to the reporter's treatment of the grid connection in this case. The first is a distinct irrationality challenge about taking the benefits of the project that could only be realised were a grid connection to be installed without taking the disbenefits into account. The remaining grounds address the central issue of whether the windfarm and associated grid connection properly constituted a single project requiring an Environmental Impact Assessment of the whole development and not just the construction phase. The reporter's reasons for rejecting the contention that the construction and grid connection phases were parts of the same EIA development are also attacked as inadequate. We will address the central issue first.

Did the reporter err in his approach to the project splitting objection?

[43] The appellant's objection on the proposed division of the scheme was raised directly with the reporter in a written response to the interested party's appeal. That submission contended that it would be wrong to assess the proposal without having regard to the environmental impact of the necessary grid connection, and "the absence of a full assessment would lead to a legally inadequate EIA assessment" (Appendix page 127, paragraph 13). This substantial challenge is addressed in a single brief paragraph of the decision, paragraph 129 (reproduced above at [17]). In disagreeing with the contention that the full environmental effects of the interested party's proposal could not be assessed

without considering the detail of the necessary grid infrastructure, the reporter acknowledged that it was unknown whether the future grid connection solution would require planning permission. The statement that the grid connection solution would, regardless of whether planning permission is required "be subject to its own evaluation" is opaque. It does not address the critical issue of whether the windfarm and associated grid connection are a single project for the purpose of EIA assessment. The reference to the grid connection being "not part of the current proposal", while accurate, is a bald statement of fact and not an evaluation of whether such an approach is acceptable as a matter of environmental law.

[44] More fundamentally, in addressing the objector's reference to "salami slicing" and regarding it as "misdirected", the reporter asserted that the term "properly refers to *an attempt to circumvent* the objectives of the EIA Directive and regulations" (my emphasis) by dividing a single project into separate parts. The authorities are clear that intention is not the relevant benchmark; what matters is the effect that a project is likely to have on the environment (*Commission* v *Spain* (Case C-227/01) [2005] Env LR 20; *R (Ashchurch Rural Parish Council* v *Tewkesbury BC* [2023] EWCA Civ 101). The reasoning ended with an assertion that the development proposal has been subject to EIA "in the normal way" and that any subsequent proposal for a grid connection, if EIA development, would also require to be so assessed.

[45] We consider that the reporter erred in failing to conduct the necessary fact specific evaluation of the proposal. It was incumbent upon him to do so before reaching a conclusion on whether the windfarm and grid connection constituted a single project for which an EIA report that analysed the potentially significant cumulative effects of both aspects was required. We reject the submission made at the hearing before us by Senior

Counsel for the respondents that any error by the reporter on this point was not a material one. This was a material error. Further, and also materially, the reporter misdirected himself in relation to the definition of "salami slicing" in a way that resulted in a failure to focus on the fundamental question of the interrelationship between the two phases of development and whether they both required an EIA at this stage. By focusing too narrowly on the way in which the application was framed rather than considering what was the true nature and scope of the project, the reporter failed to show that he understood the central issue in contention. In contrast with the situation in *Wildland* v *Highland Council* [2021] CSOH 87; 2022 SLT 1082 (discussed at paragraphs [23]-[24] above) the reporter proceeded on the basis that it was unknown whether planning permission would be required for the future work not included for assessment in the EIA. That lack of knowledge was relevant to the correct approach that should have been taken to the project splitting issue.

[46] The need to conduct a properly focussed fact specific analysis is amply supported by the recent domestic authorities. In *Ashchurch* the Court of Appeal was clear that when considering a project in the context of the EIA Directive the decision-making authority should consider "the degree of connection" between the development and its putative effects (paragraph 74). In doing so, the decision maker is not constrained by the terms of the application before him (*Ashchurch* at paragraph 78). What was required in this case was careful consideration of whether the windfarm construction and grid connection were, on the basis of the available material, so closely connected as to form parts of a single project. There was, however, no attempt to consider the type of factors listed in *R (Wingfield)* v *Canterbury City Council* [2020] JPL 154 as relevant to such an exercise. The issue of functional interdependence was clearly relevant, as indisputably the windfarm could never become functional without a grid connection. It may be that other factors could have militated

against a conclusion that the scheme constituted a single project. Senior Counsel for the respondents highlighted that in both the Annexes to EU Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment and in the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/102) wind farms and grid connections are the subject of separate project descriptions. However, that general observation does not assist the task of considering a particular scheme.

[47] As the Court of Appeal confirmed in *R (Together against Sizewell C Ltd)* v *Secretary of State for Energy Security and Net Zero* [2023] EWCA Civ 1517 (at paragraph 68) under reference to paragraphs 81, 83 and 100 of *Ashchurch,* it is not for the court to undertake the necessary evaluation. It is sufficient that we have concluded that the decision does not illustrate that such an evaluation was carried out at all, or at least not adequately. This court is not in a position to decide whether in fact the project under consideration constituted a single project for the purposes of assessing its environmental impact; that has yet to be properly determined. Such a determination properly falls to be made by the appropriate authority, the respondents.

[48] The conclusion we have reached is also consistent with the authorities from the Republic of Ireland, where the issue of the nature of windfarm projects requiring grid connections has been closely analysed in the context of the requirements of the 2011 Directive on several occasions. In that jurisdiction the approach has been to treat the separation of windfarm construction from the necessary grid connection as an issue of principle and the view is that such separation is unlawful having regard to the terms of the 2011 Directive. In the UK jurisdictions, the focus has tended to be on the decision maker's role in undertaking a proper evaluative assessment before determining whether the project

can be regarded as a single one for the purposes of assessing cumulative environmental impacts. However, the need for such a fact specific evaluation before any decision can be made is a common theme between the two approaches and is supported by the influential reasoning of Advocate General Gulmann in *Bund Naturschutz* v *Freistaat Bayern* (Case C-396/92) [1994] ECR 1 - 3717. The respondents' somewhat curious submission that the Irish cases should be treated with caution misses that point. In any event, while each member state will have transposed the 2011 Directive into its own national laws, that does not detract from the value of domestic courts considering the interpretative approach to the 2011 Directive taken by other states.

[49] We endorse the view expressed by Baker J (*Daly,* at paragraphs 44-45) that it cannot be said in absolute terms that the only permissible way in which a planning application for a windfarm can be made is to apply for the whole project to include the grid connection. The Regulations themselves cater for multistage consent processes. The requirement is to identify "the project" for the purpose of compliance with the 2011 Directive. Where, as in this case, whether there will be any future EIA is unknown, the approach that may best secure compliance may be to address the cumulative environmental impact of the whole project before the first decision on planning permission is made. That would be consistent with the 2011 Directive's enjoinder to take the environmental effects into account "at the earliest possible stage in all the technical planning and decision-making processes" (2011 Directive recital (2)). Notably, the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora does not require that the assessment be carried out at the earliest possible stage (Lang J in *Wingfield* at para 73, referred to by the UKSC in *C G Fry and Son* v *Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 1622 (Admin); [2025] UKSC 35, at para 41).

[50] Senior Counsel for the respondents and the interested party both sought to commend the "staged approach" to assessment referred to in *Sizewell* as legitimate and preventative of delay and sclerosis in the system. The argument was that in cases where the end user and details of the off-site works were not yet known, it might be well-nigh impossible to include a description of the likely significant environmental effects of those works. At the hearing before us, affidavits were available on this point, from Michael David Briggs, employed as Head of Planning (South Scotland) for the interested party and Ian Kelly, an independent planning consultant.

[51] Mr Briggs confirmed that he had played a key role in planning applications or appeal processes for 28 separate onshore windfarm projects within the UK. In none of those had the potential impact of the off-site grid connection been assessed in detail as part of the EIA for the construction of the windfarm. His affidavit explained that there is a highly structured process through which individual energy generation projects must secure a grid connection agreement to connect their generating assets to the electricity transmission and/or distribution networks. Some grid connection agreements require significant and expensive reinforcements works to be undertaken. Accepting a grid connection offer can involve a significant financial commitment for the developer, with overall costs being incurred on a staged basis but frequently running into tens of millions of pounds. It was not uncommon for generating projects to have achieved permission without any access to the network being secured to avoid the risk of making potentially abortive payments under a connection agreement. As the network planning system worked on a "first come first served basis", a congested connection queue had now formed, with many speculative projects with connection dates years in advance blocking projects ready to proceed.

[52] Mr Kelly had been engaged by the appellant to assist in the presentation of their objections to the Wull Muir Wind Farm planning application. In his affidavit he accepted that in previous applications the potential environmental impact of the grid connection had not been assessed "in detail" as a matter of fact but not as a statement of what the position should be. In his view, grid connection planning should proceed alongside the preparation of a wind farm application rather than separately. This would avoid planning permission being granted for windfarms with little prospect of securing a grid connection date within the lifetime of the consent given the backlogs in the system. Identification of the offsite infrastructure requirements for all other land use development projects at an early stage was standard procedure. There was a known connection point for Wull Muir Wind Farm and the assessment work could have been progressed earlier, at least by the planning appeal stage.

[53] The practical and financial difficulties relied on by the interested party as militating against undertaking a cumulative assessment of the environmental impacts of the proposed scheme at an earlier stage are relevant insofar as, indisputably, the 2011 Directive must be interpreted realistically. There is, however, support in the affidavits, particularly that of Mr Kelly, for the view that it would not have been unrealistic in the circumstances of the current process to have done so. The practical and commercial difficulties that flow from the details of a grid connection being unavailable early in the planning stages of a windfarm development were also raised as an issue in the Irish cases of *Ó Grianna* v *An Bord Pleanála* [2014] IEHC 632 and *Sweetman* v *An Bord Pleanála* [2023] IEHC 89. Peart J in *Ó Grianna* considered (at paragraph 32) that the lack of formulated proposals for the design and route of the connection of a windfarm to the gird did not justify treating phase 1 of a scheme as a stand-alone project, rather it was suggestive of permission being sought prematurely. That

the expediencies of assessing the environmental impacts of the construction of a windfarm before the grid connection details were available are not of themselves a reason to justify project splitting was reiterated by Quinn J in *Sweetman* (at paragraph 151).

[54] Senior counsel for the respondents also sought to rely on the decision in *C G Fry* before both the Court of Appeal of England and Wales ([2024] EWCA Civ 730; at paragraph 91) and the UK Supreme Court (cited above at paragraph [49]) at paragraph 39 as support for the proposition that it was lawful for environmental assessment to be carried out at a later stage. She acknowledged, however, that the relevant passages had been addressing multi-stage consents and comments about the need to avoid sclerosis in the system were made in that context. The considerations in this case are different and the conclusions we have reached do not conflict with the decision in *C G Fry.*

Adequacy of Reasons

[55] We accept, as Senior Counsel for the respondents emphasised in her submissions, that a decision of this sort should not be scrutinised as if it were a conveyancing document. The brevity of the reporter's reasoning would not be a deficiency of itself if it was clear as to why the appellant's objections had been dismissed. However, in addition to the apparent error about "salami slicing" relating to an attempt to circumvent the 2011 Directive as opposed to that being the objective effect of project splitting, paragraph 129 of the decision contains largely assertion and conclusions and is bereft of reasoning directed at the point at issue. It fails the requirement of identifying (correctly) the live issues "and framing the determination in a manner that leaves the reader in no doubt about what the reason for the decision were and what considerations were taken into account" (*West Lothian Council* v *Scottish Ministers* [2023] CSIH 3; 2023 SLT 175, Lord President (Carloway) at paragraph [24]).

The irrationality challenge

[56] The distinct irrationality challenge advanced by the appellant touched on the aspects of the wider scheme that were taken into account by the reporter. Although the grid connection had not been included in the planning application, the reporter had placed considerable weight on the wider benefits that would result from the operation of the windfarm once connected to the grid. He also had regard to renewable energy and climate change benefits, which could arise only once the grid connection was in place. Specific reference was made to the predicted generating capacity of the development once operational. In *Ashchurch* the road bridge that was part of a wider residential development had been the subject of an EIA that did not include the wider development. The Court of Appeal considered that this was irrational, Andrews LJ stating (at paragraph 64) that whilst "it was open to the decision-maker to treat the prospective benefits of the wider development as material factors… it was irrational to do so without taking account of any adverse impact that the envisaged development might have, to the extent that it was possible to do so… The two go hand in hand; you cannot have one without the other."

[57] We consider that there is force in the submission that the approach in this case was similarly irrational. The respondents' answer to the point was that the reporter was entitled to assess the proposed development on its own merits and on the assumption that a grid connection would be provided at a later date. That does not, with respect, address the irrationality of addressing only the merits and not the demerits of the anticipated completed development. We have already addressed the need to evaluate the proposal in a way that is not necessarily limited to the specific terms of the planning application. In any event, the reporter's consideration of the proposed development as a whole, at least in relation to

socio-economic and climate change benefits, is illustrative of the potential difficulty in treating the two phases as entirely separate for the purpose of assessing the environmental impacts.

Disposal

[58] Clearly matters have moved on in this case since the original planning application was considered by Scottish Borders Council. Some progress has been made with identification of a grid connection solution. Having concluded that there were material errors in the reporter's approach, we consider that it would be appropriate for the issue of whether the whole project requires an EIA assessment to be considered of new. We shall quash the decision of 14 January 2025 and remit the interested party's appeal to a different reporter for a fresh decision.