



# Supplemental EIS submission

Peter Sweetman

16 January 2019



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Aquaculture Licence Appeals Board  
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R32 DTW5

2019-01-16

**SUBMISSION RE AP2/1-14/2015 Response to Supplementary EIS from  
Marine Harvest Ireland in relation to the foreshore licence application at  
Shot Head, Bantry Bay, Co. Cork.**

Dear Sir/Madam

It is not possible for ALAB to grant a permission for this development which would  
comply with the following judgements of the CJEU;

Case C-258/11, Peter Sweetman and Others v An Bord Pleanála

Case C-323/17 People Over Wind and Peter Sweetman v Coillte Teoranta

Case C-461/17 Brian Holohan and Others v An Bord Pleanála

Yours faithfully

A handwritten signature in black ink, appearing to read 'Peter Sweetman', written in a cursive style.

Peter Sweetman





**OHara, Mary**

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**From:** peter sweetman <sweetmanplanning@gmail.com>  
**Sent:** 17 January 2019 01:04  
**To:** Ohara, Mary (Alab)  
**Subject:** AP2/1-14/2015  
**Attachments:** 03 SUB.pdf

submission attached

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Peter Sweetman  
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## JUDGMENT OF THE COURT (Third Chamber)

11 April 2013 (\*)

(Environment – Directive 92/43/EEC – Article 6 – Conservation of natural habitats – Special areas of conservation – Assessment of the implications for a protected site of a plan or project – Criteria to be applied when assessing the likelihood that such a plan or project will adversely affect the integrity of the site concerned – Lough Corrib site – N6 Galway City Outer Bypass road scheme)

In Case C-258/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 13 May 2011, received at the Court on 26 May 2011, in the proceedings

**Peter Sweetman,**

**Ireland,**

**Attorney General,**

**Minister for the Environment, Heritage and Local Government**

v

**An Bord Pleanála,**

notice parties:

**Galway County Council,**

**Galway City Council,**

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as the President of the Third Chamber, K. Lenaerts, G. Arestis (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2012,

after considering the observations submitted on behalf of:

- Mr Sweetman, by B. Harrington, Solicitor, and R. Lyons SC,
- Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government, by E. Creedon, acting as Agent, and G. Simons SC and M. Gray BL,

- An Bord Pleanála, by A. Doyle and O. Doyle, Solicitors, and N. Butler SC,
- Galway County Council and Galway City Council, by V. Raine and A. Casey, acting as Agents, E. Keane SC and B. Kennedy BL,
- the Greek Government, by G. Karipsiades, acting as Agent,
- the United Kingdom Government, by H. Walker, acting as Agent, and K. Smith, Barrister,
- the European Commission, by S. Petrova and K. Mifsud-Bonnici, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2012,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; ‘the Habitats Directive’).
- 2 The request has been made in proceedings between (i) Mr Sweetman, Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government and (ii) An Bord Pleanála (the Irish Planning Board), supported by Galway County Council and Galway City Council, concerning An Bord Pleanála’s decision to grant development consent for the N6 Galway City Outer Bypass road scheme.

### **Legal context**

#### *European Union law*

- 3 The third recital in the preamble to the Habitats Directive states:

‘... the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; ... the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities’.

- 4 Article 1(d), (e), (k) and (l) of the Habitats Directive provide:

‘For the purpose of this Directive:

...

- (d) *priority natural habitat types* means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (\*) in Annex I;



- (e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservative status of a natural habitat will be taken as “favourable” when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable as defined in (i);

...

- (k) *site of Community importance* [“SCI”] means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

...

- (l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated’.

5 Article 2 of the Habitats Directive is worded as follows:

‘1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.’

6 Article 3(1) of the Habitats Directive states:

‘A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network ... shall enable the natural habitat types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to [Council] Directive 79/409/EEC [of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1)].’

7 Article 6(2) to (4) of the Habitats Directive provide:

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

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

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

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

8 Annex I to the Habitats Directive, entitled ‘Natural habitat types of Community interest whose conservation requires the designation of special areas of conservation’, designates ‘[l]imestone pavements’ as a priority habitat type, under code 8240.

*Irish law*

9 The European Communities (Natural Habitats) Regulations, 1997, in the version applicable at the material time (‘the 1997 Regulations’), implement the obligations of the Habitats Directive in Irish law.

10 Regulation 30 of the 1997 Regulations, which transposed the requirements of Article 6 of the Habitats Directive, provides:

‘(1) Where a proposed road development in respect of which an application for the approval of the [competent authority] has been made in accordance with section 51 of the Roads Act, 1993, is neither directly connected with nor necessary to the management of a European site but likely to have a significant effect thereon either individually or in combination with other developments, the [competent authority] shall ensure that an appropriate assessment of the implications for the site in view of the site’s conservation objectives is undertaken.



- (2) An environmental impact assessment as required under subsection (2) of section 51 of the Roads Act, 1993, in respect of a proposed road development referred to in paragraph (1) shall be an appropriate assessment for the purposes of this Regulation.
- (3) [The competent authority] shall, having regard to the conclusions of the assessment undertaken under paragraph (1), agree to the proposed road development only after having ascertained that it will not adversely affect the integrity of the European site concerned.
- (4) In considering whether the proposed road development will adversely affect the integrity of the European site concerned, the [competent authority] shall have regard to the manner in which the proposed development is being carried out or to any conditions or restrictions subject to which the approval is given.
- (5) [The competent authority] may, notwithstanding a negative assessment and where [it] is satisfied that there are no alternative solutions, decide to agree to the proposed road development where the proposed road development has to be carried out for imperative reasons of overriding public interest.
- (6) (a) Subject to paragraph (b) imperative reasons of overriding public interest shall include reasons of a social or economic nature;  
(b) If the site concerned hosts a priority natural habitat type or a priority species, the only considerations of overriding public interest shall be –
  - (i) those relating to human health or public safety,
  - (ii) beneficial consequences of primary importance for the environment, or
  - (iii) further to an opinion from the Commission to other imperative reasons of overriding public interest.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 11 By decision of 20 November 2008, An Bord Pleanála decided to grant development consent for the N6 Galway City Outer Bypass road scheme. Part of the proposed road was planned to cross the Lough Corrib SCI. Following an enlargement of the extent of the SCI, it hosts a total of 14 habitats referred to in Annex I to the Habitats Directive, of which six are priority habitat types, including karstic limestone pavement, the specific protected habitat forming the subject-matter of the main proceedings.
- 12 The road scheme involves the permanent loss within the Lough Corrib SCI of approximately 1.47 hectares of that limestone pavement. Those 1.47 hectares will be lost from an area which was described by An Bord Pleanála's inspector as constituting a 'distinct sub-area and an area having the particular characteristic of possessing substantial areas of a priority habitat', and which contains a total of 85 hectares of limestone pavement. That surface of 85 hectares itself forms part of a total of 270 hectares of such limestone pavement – which constitutes a priority habitat type referred to in Annex I to the Habitats Directive – in the entire SCI.
- 13 At the time when An Bord Pleanála's decision was taken, that area had already been included as a potential SCI on a list of sites transmitted by Ireland to the Commission. The

extended Lough Corrib site was formally classified as an SCI by a Commission decision of 12 December 2008. According to the referring court, although the extended Lough Corrib site was not formally classified by the Commission as an SCI before that date, An Bord Pleanála was required under national law to apply legal protections equivalent to those under Article 6(2) to (4) of the Habitats Directive to that site from December 2006.

- 14 In its decision of 20 November 2008, An Bord Pleanála stated, *inter alia*, that ‘it is considered that the part of the road development being approved would be an appropriate solution to the identified traffic needs of the city and surrounding area ... and, while having a localised severe impact on the Lough Corrib candidate Special Area of Conservation, would not adversely affect the integrity of this candidate special Area of Conservation. The development, hereby approved, would not, therefore, have unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area.’
- 15 Mr Sweetman applied to the High Court for leave to issue judicial review proceedings against, in particular, An Bord Pleanála’s decision of 20 November 2008. He submitted that An Bord Pleanála had erred in its interpretation of Article 6 of the Habitats Directive in concluding, in particular, that the effect of the road scheme on the Lough Corrib protected site would not constitute an ‘adverse effect on the integrity of the site’.
- 16 By decision of 9 October 2009, the High Court dismissed the application for leave to issue judicial review proceedings and upheld An Bord Pleanála’s decision. On 6 November 2009 Mr Sweetman was granted leave to appeal to the Supreme Court against the decision of 9 October 2009.
- 17 The Supreme Court observes that it has doubts as to when and in what circumstances, where an appropriate assessment of a plan or project is carried out pursuant to Article 6(3) of the Habitats Directive, such a plan or project is likely to have ‘an adverse effect on the integrity of the site’. In that regard, the Supreme Court states that the judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405 has not fully dispelled its doubts.
- 18 It is in those circumstances that the Supreme Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
  - ‘1. What are the criteria in law to be applied by a competent authority to an assessment of the likelihood of a plan or project the subject of Article 6(3) of the Habitats Directive, having “an adverse effect on the integrity of the site”?’
  2. Does the application of the precautionary principle have as its consequence that such a plan or project cannot be authorised if it would result in the permanent non-renewable loss of the whole or any part of the habitat in question?
  3. What is the relationship, if any, between Article 6(4) and the making of the decision under Article 6(3) that the plan or project will not adversely affect the integrity of the site?’

### **Consideration of the questions referred**

#### *Jurisdiction of the Court*



- 19 Galway County Council and Galway City Council plead, in essence, that the Court lacks jurisdiction to answer the questions referred for a preliminary ruling given that Article 6(3) of the Habitats Directive is not applicable to the main proceedings because An Bord Pleanála's decision approving the N6 Galway City Outer Bypass road scheme was adopted before the Commission decision to classify as an SCI the Lough Corrib site extension which is affected by the scheme.
- 20 It is indeed apparent from the order for reference that, on the date of An Bord Pleanála's decision, 20 November 2008, the extension of the Lough Corrib site had been notified within Ireland, under Regulation 4 of the 1997 Regulations, but had not yet been designated as an SCI in the list of sites adopted by the Commission. Such a decision was adopted by the Commission on 12 December 2008, that is to say, three weeks after An Bord Pleanála's decision.
- 21 In the main proceedings, as the referring court itself states, Regulation 30 of the 1997 Regulations largely replicates the wording of Article 6 of the Habitats Directive. It follows, furthermore, from the title of the 1997 Regulations that the Irish legislature intended by their adoption to transpose that directive into domestic law. Finally, as the referring court observes, by according a notified site protection equivalent to that under Article 6(2) to (4) of the Habitats Directive before its designation as an SCI in the list adopted by the Commission, Ireland considered itself to have complied with its obligation to take appropriate protective measures pending designation of a site as an SCI.
- 22 On that last point, it should be recalled that the Court has already held that, whilst the protective measures prescribed in Article 6(2) to (4) of the Habitats Directive are required only as regards sites which are placed on the list of sites selected as SCIs drawn up by the Commission, this does not mean that the Member States do not have to protect sites as soon as they propose them, under Article 4(1) of the directive, as sites eligible for identification as SCIs on the national list transmitted to the Commission (see Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraphs 25 and 26, and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, paragraphs 36 and 37).
- 23 Therefore, as soon as a site is proposed by a Member State, pursuant to Article 4(1) of the Habitats Directive, on the national list transmitted to the Commission as a site eligible for identification as an SCI, and at least until the Commission adopts a decision in that regard, that Member State is, by virtue of the Habitats Directive, required to take protective measures of such a kind as to safeguard the ecological interest referred to (see, to this effect, *Dragaggi and Others*, paragraph 29, and *Bund Naturschutz in Bayern and Others*, paragraph 38). The situation of such a site thus cannot be categorised as a situation not falling within the scope of European Union law.
- 24 It accordingly follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred for a preliminary ruling by the Supreme Court.

#### *Substance*

- 25 By its questions, which it is appropriate to deal with together, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that in a situation such as that in the main proceedings a plan or project not directly connected with or necessary to the management of a site adversely affects the integrity of that site. For the purposes of such an interpretation, the referring court raises the question of the possible effect of the precautionary principle and the question of the relationship between Article 6 (3) and Article 6(4) of the Habitats Directive.



- 26 It is apparent from the order for reference that the implementation of the N6 Galway City Outer Bypass road scheme would result in the permanent and irreparable loss of part of the Lough Corrib SCI's limestone pavement, which is a priority natural habitat type specially protected by the Habitats Directive. Following assessment of the impact of the road scheme on the Lough Corrib SCI, An Bord Pleanála established that it would have a locally significant negative impact on the SCI, but decided that such an impact did not adversely affect the integrity of that site.
- 27 According to Mr Sweetman, Ireland, the Attorney General, the Minister for the Environment, Heritage and Local Government and the Commission, a negative impact of that kind on the site caused by that road scheme necessarily entails an adverse effect on the site's integrity. By contrast, An Bord Pleanála, Galway County Council and Galway City Council and the United Kingdom Government submit that the finding of damage to that site is not necessarily incompatible with there being no adverse effects on its integrity.
- 28 Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 34, and Case C-182/10 *Solvay and Others* [2012] ECR, paragraph 66).
- 29 That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 41 and 43).
- 30 Where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light of, in particular, the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 49).
- 31 The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4).
- 32 In appraising the scope of the expression 'adversely affect the integrity of the site' in its overall context, it should be made clear that, as the Advocate General has noted in point 43 of her Opinion, the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species (see, to this effect, Case C-404/09 *Commission v Spain* [2011] ECR I-11853, paragraph 142), whilst Article 6(4) merely derogates from the second sentence of Article 6(3).
- 33 The Court has already held that Article 6(2) of the Habitats Directive makes it possible to comply with the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration as well as



disturbance which could have significant effects in the light of the directive's objectives (Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 49 and the case-law cited).

- 34 Article 6(4) of the Habitats Directive provides that if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see Case C-304/05 *Commission v Italy* [2007] ECR I-7495, paragraph 81, and *Solvay and Others*, paragraph 72).
- 35 As an exception to the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) can apply only after the implications of a plan or project have been analysed in accordance with Article 6(3) (see *Solvay and Others*, paragraphs 73 and 74).
- 36 It follows that Article 6(2) to (4) of the Habitats Directive impose upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of the directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation.
- 37 In this regard, according to Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is taken as 'favourable' when, in particular, its natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.
- 38 In this context, the Court has already held that the Habitats Directive has the aim that the Member States take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types (see Case C-308/08 *Commission v Spain* [2010] ECR I-4281, paragraph 21, and Case C-404/09 *Commission v Spain*, paragraph 163).
- 39 Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.
- 40 Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 99, and *Solvay and Others*, paragraph 67).
- 41 It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in



an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 58).

- 42 Such an appraisal applies all the more in the main proceedings, since the natural habitat affected by the proposed road scheme is among the priority natural habitat types, which Article 1(d) of the Habitats Directive defines as ‘natural habitat types in danger of disappearance’ for whose conservation the European Union has ‘particular responsibility’.
- 43 The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned (see, as regards the disappearance of priority species, Case C-308/08 *Commission v Spain*, paragraph 21, and Case C-404/09 *Commission v Spain*, paragraph 163).
- 44 So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.
- 45 In the main proceedings, the Lough Corrib SCI was designated as a site hosting a priority habitat type because, in particular, of the presence in that site of limestone pavement, a natural resource which, once destroyed, cannot be replaced. Having regard to the criteria referred to above, the conservation objective thus corresponds to maintenance at a favourable conservation status of that site’s constitutive characteristics, namely the presence of limestone pavement.
- 46 Consequently, if, after an appropriate assessment of a plan or project’s implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.
- 47 In those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive. Nevertheless, in such a situation, the competent national authority could, where appropriate, grant authorisation under Article 6(4) of the directive, provided that the conditions set out therein are satisfied (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 60).
- 48 It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of

SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

### Costs

- 49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.**

[Signatures]





## JUDGMENT OF THE COURT (Seventh Chamber)

12 April 2018 (\*)

(Reference for a preliminary ruling — Environment — Directive 92/43/EEC — Conservation of natural habitats — Special areas of conservation — Article 6(3) — Screening in order to determine whether or not it is necessary to carry out an assessment of the implications, for a special area of conservation, of a plan or project — Measures that may be taken into account for that purpose)

In Case C-323/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 10 May 2017, received at the Court on 30 May 2017, in the proceedings

**People Over Wind,**

**Peter Sweetman**

v

**Coillte Teoranta,**

THE COURT (Seventh Chamber),

composed of A. Rosas, President of the Chamber, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- People Over Wind and Mr Sweetman, by O. Clarke, Solicitor, O. Collins, Barrister-at-Law, and J. Devlin, Senior Counsel,
- Coillte Teoranta, by J. Conway, Solicitor, S. Murray, Barrister-at-Law, and D. McGrath, Senior Counsel,
- the European Commission, by C. Hermes and E. Manhaeve, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive').
- 2 The request has been made in proceedings brought by People Over Wind, an environmental NGO, and by Peter Sweetman against Coillte Teoranta ('Coillte'), a company owned by the Irish State that operates in the forestry sector, relating to the works necessary to lay the cable connecting a wind farm to the electricity grid.

### **Legal context**

#### *EU law*

- 3 The 10th recital of the Habitats Directive states:  
  
'... an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'.
- 4 Article 2 of the Habitats Directive provides:  
  
'1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.  
  
2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.  
  
3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'
- 5 Article 3(1) of the Habitats Directive is worded as follows:  
  
'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.  
  
...'
- 6 Article 6 of the Habitats Directive states:  
  
'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.  
  
2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.



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

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

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

*Irish law*

- 7 The High Court (Ireland) explains that development consent is regulated by the Planning and Development Acts and regulations made thereunder. The competent authority is the local planning authority and an appeal lies to An Bord Pleanála (the Irish Planning Board).
- 8 Certain types of development are classified as 'exempted development' and, subject to certain exceptions, do not require consent under the Planning and Development Acts. Thus, an example of exempted development is 'the carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking'.
- 9 Nevertheless, 'exempted development' projects may be subject to other types of consent or a process of adoption. The European Communities (Birds and Natural Habitats) Regulations 2011 ('the 2011 Regulations') apply to projects other than developments requiring development consent within the meaning of the Planning and Development Acts. Furthermore, a development which comes within 'exempted development' must nevertheless be subject to consent under the Planning and Development Acts where appropriate assessment under Article 6(3) of the Habitats Directive is required.
- 10 Regulation 42 of the 2011 Regulations provides:
  - '1. A screening for Appropriate Assessment of a plan or project for which an application for consent is received, or which a public authority wishes to undertake or adopt, and which is not directly connected with or necessary to the management of the site as a European Site, shall be carried out by the public authority to assess, in view of best scientific knowledge and in view of the conservation objectives of the site, if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site.
  2. A public authority shall carry out a screening for Appropriate Assessment under paragraph (1) before consent for a plan or project is given, or a decision to undertake or adopt a plan or project is taken.



...

6. The public authority shall determine that an Appropriate Assessment of a plan or project is required where the plan or project is not directly connected with or necessary to the management of the site as a European Site and if it cannot be excluded, on the basis of objective scientific information following screening under this Regulation, that the plan or project, individually or in combination with other plans or projects, will have a significant effect on a European site.

7. The public authority shall determine that an Appropriate Assessment of a plan or project is not required where the plan or project is not directly connected with or necessary to the management of the site as a European Site and if it can be excluded on the basis of objective scientific information following screening under this Regulation, that the plan or project, individually or in combination with other plans or projects, will have a significant effect on a European site.'

**The dispute in the main proceedings and the question referred for a preliminary ruling**

- 11 The main proceedings relate to the assessment of the effects that the laying of the cable connecting a wind farm to the electricity grid potentially has on two special areas of conservation under the European ecological network Natura 2000, one of which is that of the River Barrow and River Nore (Ireland). That river constitutes a habitat for the Irish subspecies of the freshwater pearl mussel (*margaritifera durrovensis*; 'the Nore pearl mussel'), which is included in Annex II to the Habitats Directive. The extant adult population of this pearl mussel is, according to the estimates mentioned by the referring court, as low as 300 individuals, having been as high as 20 000 individuals in 1991. The life span of each individual is said to be between 70 and 100 years, but the Nore pearl mussel is said not to have reproduced itself since 1970. According to the referring court, it is apparent from recent monitoring surveys that this species is threatened with extinction, on account of the high level of sedimentation of the bed of the River Nore, to which the species is particularly vulnerable, sedimentation which inhibits the successful restocking of the river by juveniles.
- 12 The consent required for developing the wind farm at issue in the main proceedings, with the exception of its connection to the grid, was dealt with in previous procedures. The consent granted by An Bord Pleanála in 2013 was subject to various conditions. Thus, according to condition 17 of that planning permission, 'the construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall provide details of intended construction practice for the development, including ... (k) means to ensure that surface water run-off is controlled such that no silt or other pollutants enter watercourses ...'.
- 13 Following the grant of that permission, the developer addressed the question of connecting the wind farm concerned to the electricity grid by means of a cable. The dispute in the main proceedings concerns that connection.
- 14 The applicants in the main proceedings submit that river pollutants resulting from the laying of the connection cable, such as silt and sediment, will have a harmful effect on the Nore pearl mussel.



- 15 Coillte contends that the cable laying at issue in the main proceedings is ‘exempted development’ not requiring consent, within the meaning of the applicable national planning legislation. However, it accepts that, if the project were to require appropriate assessment of the environmental implications, planning permission would have to be obtained from the local planning authority.
- 16 In order to determine whether it was necessary to carry out such appropriate assessment, Coillte instructed consultants to conduct the examination (‘screening’).
- 17 The screening report drawn up by those consultants concluded, inter alia, as follows:
- ‘(a) In the absence of protective measures, there is potential for the release of suspended solids into waterbodies along the proposed route, including directional drilling locations.
  - (b) With regards to [the Nore pearl mussel], if the construction of the proposed cable works was to result in the release of silt or pollutants such as concrete into the pearl mussel population area of river through the pathway of smaller streams or rivers, there would be a negative impact on the pearl mussel population. Sedimentation of gravels can prevent sufficient water flow through the gravels, starving juvenile [Nore pearl mussels] of oxygen.’
- 18 It is apparent from the file before the Court that ‘protective measures’ were also analysed by that report.
- 19 Subsequently, on the basis of that report, the following recommendation was drawn up for Coillte by the ‘programme manager’:
- ‘As set out in detail in the ... appropriate assessment screening report, on the basis of the findings of that report and in light of the best scientific knowledge, the grid connection works will not have a significant effect on the relevant European sites in light of the conservation objectives of the European sites, alone or in combination with the Cullenagh wind farm and other plans or projects, and an appropriate assessment is not required. This conclusion was reached on the basis of the distance between the proposed Cullenagh grid connection and the European sites, and the protective measures that have been built into the works design of the project.’
- 20 Adopting the above reasons and recommendation, Coillte, as a public authority referred to in Regulation 42 of the 2011 Regulations, determined that no appropriate assessment, within the meaning of Article 6(3) of the Habitats Directive, was required in this instance.
- 21 The referring court considers that the decision that appropriate assessment was not required is based on the ‘protective measures’ referred to in the screening report. That court makes clear that the protective measures proposed and taken into account by the authors of that report are not as stringent as those required in condition 17(k) of the planning permission for the wind farm concerned.
- 22 In the light of the foregoing, the High Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
- ‘Whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under Article 6(3) of the Habitats Directive?’



**Consideration of the question referred**

- 23 First of all, it should be noted that Article 6 of the Habitats Directive imposes upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of the directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation (judgments of 11 April 2013, *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 36 and the case-law cited, and of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 31).
- 24 According to the Court's case-law, the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species, whilst Article 6(4) merely derogates from the second sentence of Article 6(3) (see, to that effect, judgment of 14 January 2016, *Grüne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 52 and the case-law cited).
- 25 Thus, Article 6 of the Habitats Directive divides measures into three categories, namely conservation measures, preventive measures and compensatory measures, provided for in Article 6(1), (2) and (4) respectively. It is clear from the wording of Article 6 of the Habitats Directive that that provision contains no reference to any concept of 'mitigating measure' (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 57 and 58 and the case-law cited).
- 26 It follows that, as is apparent from the reasoning of the request for a preliminary ruling, that the measures which the referring court describes as 'mitigating measures', and which Coillte refers to as 'protective measures', should be understood as denoting measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned.
- 27 Thus, by its question, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether or not it is necessary to carry out subsequently an appropriate assessment of a project's implications for a site concerned, it is possible, at the screening stage, to take account of the measures intended to avoid or reduce the project's harmful effects on that site.
- 28 The 10th recital of the Habitats Directive states that an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future. That recital finds expression in Article 6(3) of the directive, which provides inter alia that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications for that site (judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 22).
- 29 As the Court has pointed out, Article 6(3) of the Habitats Directive refers to two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site. The second stage, which is envisaged in the second sentence of Article 6(3) and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised only if it will not adversely affect the integrity of the site concerned, subject to the provisions of



Article 6(4) of the directive (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 44 and 46 and the case-law cited).

- 30 It should be added that Article 6(3) of the Habitats Directive also integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites, resulting from the plans or projects envisaged. A less stringent authorisation criterion than that set out in that provision could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (judgment of 26 April 2017, *Commission v Germany*, C-142/16, EU:C:2017:301, paragraph 40 and the case-law cited).
- 31 In the present instance, as the parties to the main proceedings and the Commission agree, the uncertainty of the referring court concerns only the screening stage. More specifically, the referring court asks whether measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned can be taken into consideration at the screening stage, in order to determine whether it is necessary to carry out an appropriate assessment of the implications, for the site, of that plan or project.
- 32 Article 6(3) of the Habitats Directive sets out clearly that the obligation to carry out an assessment is dependent on both of the following conditions being met: the plan or project in question must not be connected with or necessary to the management of the site, and it must be likely to have a significant effect on the site.
- 33 It is apparent from the file before the Court that the referring court considers the first of those conditions to be met.
- 34 As regards the second condition, it is settled case-law that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that the plan or project in question will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (judgment of 26 May 2011, *Commission v Belgium*, C-538/09, EU:C:2011:349, paragraph 39 and the case-law cited). The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 45 and the case-law cited).
- 35 As the applicants in the main proceedings and the Commission submit, the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.
- 36 That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.
- 37 Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive.

- 38 In that regard, the Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 50 and the case-law cited).
- 39 It is, moreover, from Article 6(3) of the Habitats Directive that persons such as the applicants in the main proceedings derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment (see, to that effect, judgment of 8 November 2016, *Lesoochránárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 49).
- 40 In the light of all the foregoing considerations, the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.

#### Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

**Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the**

**harmful effects of the plan or project on that site.**

Rosas

Toader

Jarašiūnas

Delivered in open court in Luxembourg on 12 April 2018.

A. Calot Escobar


A. Rosas



Registrar

President of the Seventh  
Chamber

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 Language of the case: English.





## JUDGMENT OF THE COURT (Second Chamber)

7 November 2018 (\*)

(Reference for a preliminary ruling — Environment — Directive 92/43/EEC — Conservation of natural habitats — Conservation of wild fauna and flora — Road construction project — Appropriate assessment of effects on the environment — Extent of the obligation to state reasons — Directive 2011/92/EU — Assessment of the implications of certain projects — Annex IV, Point 3 — Article 5(3)(d) — Meaning of the concept of ‘main alternatives’)

In Case C-461/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 5 May 2017, received at the Court on 28 July 2017, in the proceedings

**Brian Holohan,**

**Richard Guilfoyle,**

**Noric Guilfoyle,**

**Liam Donegan**

v

**An Bord Pleanála,**

intervening parties:

**National Parks and Wildlife Service (NPWS),**

THE COURT (Second Chamber),

composed of A. Prechal, President of the Third Chamber, acting as President of the Second Chamber, C. Toader (Rapporteur), and A. Rosas, Judges,

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 16 May 2018,

after considering the observations submitted on behalf of:

- B. Holohan, R. Guilfoyle, N. Guilfoyle and L. Donegan, by D. Browne and C. Hugues, both Barristers-at-law, and by P. O’Higgins and J. Devlin, both Senior Counsel, instructed by C. Herlihy, L. O’Sullivan and B. Harrington, Solicitors,
- An Bord Pleanála, by F. Valentine, Barrister-at-law, and N. Butler, Senior Counsel, instructed by M. Larkin and A. Doyle, solicitors,

- Ireland, by M. Browne, G. Hodge and A. Joyce, acting as Agents, and by G. Simons, Senior Counsel, and M. Gray, Barrister-at-law,
- the Czech Government, by M. Smolek, J. Vlácil and L. Dvořáková, acting as Agents,
- the United Kingdom Government, initially by G. Brown, acting as Agent, and by C. Banner, Barrister, and subsequently by R. Fadoju and J. Kraehling, acting as Agents, and by T. Buley and C. Banner, Barristers,
- the European Commission, by C. Hermes, E. Manhaeve and M. Noll-Ehlers, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 August 2018,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; ‘the Habitats Directive’) and of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1; ‘the EIA Directive’).
- 2 The request has been made in proceedings where the opposing parties are Mr Brian Holohan, Mr Richard Guilfoyle, Mr Noric Guilfoyle and Mr Liam Donegan, on the one hand, and An Bord Pleanála (Ireland) (the Planning Board; ‘the Board’), on the other, concerning the granting of development consent for a project to extend the northern ring-road of the city of Kilkenny (Ireland) (‘the development project’).

### **Legal context**

#### ***European Union law***

##### *The Habitats Directive*

- 3 The first and third recitals of the Habitats Directive state:

‘... the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community, as stated in Article [191 TFEU];

...

... the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; ... the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities.’
- 4 Article 1 of that directive provides:



‘For the purposes of this directive:

...

- (e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The [conservation] status of a natural habitat will be taken as “favourable” when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

...

- (k) *site of Community importance* means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

...

- (l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;

...’

5 Article 2 of the Habitats Directive provides:

‘1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.’

6 Article 3(1) of the Habitats Directive is worded as follows:

‘A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural

habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

...'

7 Article 6 of that directive provides:

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

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

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

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

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

8 In accordance with Article 7 of the Habitats Directive, obligations arising under Article 6(2) to (4) of that directive are to apply to special protection areas ('SPAs') within the meaning of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive').

*The Birds Directive*

9 The fourth subparagraph of Article 4(1) of the Birds Directive provides:

'Member States shall classify in particular the most suitable territories in number and size as [SPAs] for the conservation of these species in the geographical sea and land area where this Directive applies.'

*The EIA Directive*



10 Article 1 of the EIA Directive provides:

‘1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive, the following definitions shall apply:

(a) “project” means:

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

(b) “developer” means the applicant for authorisation for a private project or the public authority which initiates a project;

(c) “development consent” means the decision of the competent authority or authorities which entitles the developer to proceed with the project;

(d) “public” means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

(e) “public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

(f) “competent authority or authorities” means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive.

...’

11 Article 2(1) of that directive provides:

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

12 Article 3 of that directive is worded as follows:

‘The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:

- (a) human beings, fauna and flora;
- (b) soil, water, air, climate and the landscape;
- (c) material assets and the cultural heritage;
- (d) the interaction between the factors referred to in points (a), (b) and (c).’

13 Article 4(1) of the EIA Directive provides:

‘Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.’

14 Article 5 of that directive provides:

‘1. In the case of projects which, pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Articles 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

- (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental factors likely to be affected;
- (b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment.

...

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

...

- (c) the data required to identify and assess the main effects which the project is likely to have on the environment;
- (d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;

...’

15 Point 3 of Annex IV to that directive, that annex being headed ‘Information referred to in Article 5(1)’ is worded as follows:

‘A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.’

16 Article 3(2) of Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92 (OJ 2014 L 124, p. 1) provides:

‘Projects shall be subject to the obligations referred to in Article 3 and Articles 5 to 11 of [the EIA Directive] prior to its amendment by this Directive where, before 16 May 2017:

- (a) the procedure regarding the opinion referred to in Article 5(2) of the [EIA Directive] was initiated; or
- (b) the information referred to in Article 5(1) of the [EIA Directive] was provided.’

*Irish law*



17 Section 177V(1) in Part XAB of the Planning and Development Act 2000 states:

‘An appropriate assessment carried out under this Part shall include a determination by the competent authority under Article 6(3) of the Habitats Directive as to whether or not a draft land use plan or proposed development would adversely affect the integrity of a European site and an appropriate assessment shall be carried out by the competent authority, in each case where it has made a determination under Section 177U(4) that an appropriate assessment is required, before ... consent is given for the proposed development.’

18 Section 177V(2) of that act provides:

‘In carrying out an appropriate assessment under subsection (1) the competent authority shall take into account each of the following matters: (a) the Natura impact report or Natura impact statement, as appropriate; (b) any supplemental information furnished in relation to any such report or statement; (c) if appropriate, any additional information sought by the authority and furnished by the applicant in relation to a Natura impact statement; (d) any additional information furnished to the competent authority at its request in relation to a Natura impact report; (e) any information or advice obtained by the competent authority; (f) if appropriate, any written submissions or observations made to the competent authority in relation to the application for consent for proposed development; (g) any other relevant information.’

19 Section 217B of the Planning and Development Act 2000 allows the Board to request further information from the roads authorities, and to invite the roads authorities to make specified alterations to the terms of a proposed road development.

20 Section 50 of the Roads Act 1993 states:

‘(2) An environmental impact statement shall contain the following specified information:

...

(d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects ...’

21 According to Section 50(5) of that act, a scoping opinion, that is, a written opinion on the information to be contained in such an environmental impact statement, must be provided if requested by the developer.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

22 The applicants in the main proceedings seek to obtain an order of *certiorari* annulling the Board’s decision of 11 July 2014 concerning the development project consent granted to Kilkenny County Council (Ireland). That development project includes the provision of approximately 1.5 kilometres of single carriageway road, the construction of one roundabout and the adaptation of a second, the provision of a footpath and a cycle track along the city side and various other works.

23 The proposed road crosses two Natura 2000 sites: the River Nore SPA, designated by Ireland under the Birds Directive, and the River Barrow and River Nore site of Community importance (the ‘SIC’), listed as an SIC under the Habitats Directive since 2004.



- 24 The applicants in the main proceedings claim, in essence, that (i) the Board erred in failing to consider the environmental effects of the main alternatives studied; (ii) the appropriate assessment purportedly carried out was deficient; and (iii) the Board erred in approving the proposed development and the Natura Impact Statement ('NIS') submitted by Kilkenny County Council, as that council had failed to carry out pre-consent ecological surveys.
- 25 The referring court states that the developer, namely Kilkenny County Council, drew up the NIS for the development project in May 2013. According to that court, the NIS, which was based on a document drafted by the National Parks and Wildlife Service (Ireland) on 19 July 2011 on conservation objectives, setting out objectives to be achieved for the purposes of classification as a special area of conservation, does not fully examine the effects on species other than those for which the River Barrow and River Nore site was listed and does not address the effects on protected species or habitats to be found outside the boundaries of the sites concerned.
- 26 In December 2013 the developer also drew up an Environmental Impact Statement ('the EIS') and on 16 December 2013 made an application to the Board for consent for the development project.
- 27 Following opposition and a hearing in April 2014, a report by the Board's inspector in relation to that application was published in June 2014. In her report, the inspector concluded that the information in that application, the EIS and the NIS was not adequate and that significant further information was required. The inspector sought greater information on, inter alia, the construction phase, a scientific baseline study, and scaled drawings indicating the location or possible location of protected species or habitats, as well as additional information on the option of 'spanning', consisting of the construction of a bridge across the floodplain. Notwithstanding that inspection report, the competent authority took the decision, in July 2014, to grant consent for the development project.
- 28 According to the referring court, the EIS does not deal in detail with the option of 'spanning', on the ground that that option was discounted by Kilkenny County Council 'at an early stage' in favour of a 'more cost effective solution'. The referring court adds that the EIS also fails explicitly to analyse the effects of the project in question on all the species identified in the EIS.
- 29 In those circumstances, the High Court (Ireland) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) whether [the Habitats Directive] has the effect that a Natura impact statement must identify the entire extent of the habitats and species for which the site is listed;
  - (2) whether [the Habitats Directive] has the effect that the potential impact on all species (as opposed to only protected species) which contribute to and are part of a protected habitat must be identified and discussed in a Natura impact statement;
  - (3) whether [the Habitats Directive] has the effect that a Natura impact statement must expressly address the impact of the proposed development on protected species and habitats both located on the [special conservation area] as well as species and habitats located outside its boundaries;
  - (4) whether [the EIA Directive], as amended, has the effect that an environmental impact statement must expressly address whether the proposed development will significantly impact on the species identified in the statement;



- (5) whether an option that the developer considered and discussed in the environmental impact assessment, and/or that was argued for by some of the stakeholders, and/or that was considered by the competent authority, amounts to a “main alternative” within the meaning of Article 5(3)(d) of [the EIA Directive], as amended, even if it was rejected by the developer at an early stage;
- (6) whether [the EIA Directive], as amended, has the effect that an environmental impact assessment should contain sufficient information as to the environmental impact of each alternative as to enable a comparison to be made between the environmental desirability of the different alternatives; and/or that it must be made explicit in the environmental impact statement as to how the environmental effects of the alternatives were taken into account;
- (7) whether the requirement in Article 5(3)(d) of [the EIA Directive], as amended, that the reasons for the developer’s choice must be made by “taking into account the environmental effects”, applies only to the chosen option or also to the main alternatives studied, so as to require the analysis of those options to address their environmental effects;
- (8) whether it is compatible with the attainment of the objectives of [the Habitats Directive] that details of the construction phase (such as the compound location and haul routes) can be left to post-consent decision, and if so whether it is open to a competent authority to permit such matters to be determined by unilateral decision by the developer, within the context of any development consent granted, to be notified to the competent authority rather than approved by it;
- (9) whether [the Habitats Directive] has the effect that a competent authority is obliged to record, with sufficient detail and clarity to dispel any doubt as to the meaning and effect of such opinion, the extent to which scientific opinion presented to it argues in favour of obtaining further information prior to the grant of development consent;
- (10) whether [the Habitats Directive] has the effect that the competent authority is required to give reasons or detailed reasons for rejecting a conclusion by its inspector that further information or scientific study is required prior to the grant of development consent; and
- (11) whether [the Habitats Directive] has the effect that a competent authority, when conducting an appropriate assessment, must provide detailed and express reasons for each element of its decision.’

### **Consideration of the questions referred**

#### ***The Habitats Directive***

- 30 First, it must be recalled that Article 6 of the Habitats Directive imposes upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of that directive, to maintain, or as the case may be, restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of interest for the European Union, in order to attain that directive’s more general objective, which is to ensure a high level of environmental protection as regards the sites protected pursuant to it (judgment of 17 April 2018, *Commission v Poland(Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 106 and the case-law cited).



- 31 More specifically, Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of an *ex ante* examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site. That provision thus prescribes two stages. The first stage, envisaged in that provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site. The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and which occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 43 to 46 and the case-law cited).

*The first three questions*

- 32 By its first three questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Article 6(3) of the Habitats Directive must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue all the habitat types and species for which a site is protected, and, on the other, identify and examine both the effects of the proposed project on the species present on the site, but for which that site has not been listed, and the effects on habitat types and species to be found outside the boundaries of that site.
- 33 Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is so when there is no reasonable scientific doubt as to the absence of such effects (judgment of 8 November 2016, *Lesoochránárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 42 and the case-law cited).
- 34 The assessment carried out under that provision may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 39 and the case-law cited).
- 35 In order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of sites of Community importance, in accordance with that directive (judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 116 and the case-law cited).
- 36 Taking account of those conservation objectives, the Court must determine the extent of the obligation to carry out an appropriate assessment of the implications of a plan or project for a site in question.



- 37 Since, as stated in paragraphs 33 and 34 of the present judgment, all aspects which might affect those objectives must be identified and since the assessment carried out must contain complete, precise and definitive findings in that regard, it must be held that all the habitats and species for which the site is protected must be catalogued. A failure, in that assessment, to identify the entirety of the habitats and species for which the site has been listed would be to disregard the abovementioned requirements and, therefore, as observed, in essence, by the Advocate General in point 31 of her Opinion, would not be sufficient to dispel all reasonable scientific doubt as to the absence of adverse effects on the integrity of the protected site (see, to that effect, judgment of 26 April 2017, *Commission v Germany*, C-142/16, EU:C:2017:301, paragraph 33).
- 38 It must also be added that, since the assessment must clearly demonstrate why the protected habitat types and species are not affected, it may be sufficient to establish, as observed by the Advocate General in point 30 of her Opinion, that only certain protected habitat types and species are present in the part of the protected area that is affected by the project and that the other protected habitat types and species present on the site are not liable to be affected.
- 39 As regards other habitat types or species, which are present on the site, but for which that site has not been listed, and with respect to habitat types and species located outside that site, it must be recalled that the Habitats Directive, as follows from the wording of Article 6(3) of that directive, subjects '[a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon' to the environmental protection mechanism of that provision. In that regard, as stated by the Advocate General in points 43 and 48 of her Opinion, the conservation objective pursued by the Habitats Directive, recalled in paragraph 35 of the present judgment, entails that typical habitats or species must be included in the appropriate assessment, if they are necessary to the conservation of the habitat types and species listed for the protected area.
- 40 In the light of the foregoing, the answer to the first three questions is that Article 6(3) of the Habitats Directive must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site.

*The eighth question*

- 41 By its eighth question, which the Court can deal with in the second place, the referring court seeks, in essence, to ascertain whether Article 6(3) of the Habitats Directive must be interpreted as meaning that it enables the competent authority to grant to a plan or project development consent which leaves for later decision the determination of certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, and, if so, whether those parameters may, at that later stage, be determined unilaterally by the developer and merely notified to that authority.
- 42 It must be recalled that it is clear from Article 6(3) of the Habitats Directive that competent national authorities are not to agree to a plan or project that is not directly connected with or necessary to the management of the site but is likely to have a significant effect thereon, unless they have first ascertained by means of an appropriate assessment that it will not adversely affect the integrity of the site concerned.
- 43 In accordance with the case-law cited in paragraphs 33 and 34 of the present judgment, an appropriate assessment of the implications of a plan or project for a protected site entails,



first, that, before that plan or project is approved, all aspects of that plan or project that might affect the conservation objectives of that site are identified. Second, such an assessment cannot be considered to be appropriate if it contains lacunae and does not contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the plan or project on that site. Third, all aspects of the plan or project in question which may, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field.

- 44 Those obligations, in accordance with the wording of Article 6(3) of the Habitats Directive, are borne not by the developer, even if the developer is, as in this case, a public authority, but by the competent authority, namely the authority that the Member States designate as responsible for performing the duties arising from that directive.
- 45 It follows that that provision requires the competent authority to catalogue and assess all aspects of a plan or project that might affect the conservation objectives of the protected site before granting the development consent at issue.
- 46 As also observed by the Advocate General in points 56 and 57 of her Opinion, only those parameters as to the effects of which there is no scientific doubt that they might affect the site can be entirely left to be decided later by the developer.
- 47 In the light of the foregoing, the answer to the eighth question is that Article 6(3) of the Habitats Directive must be interpreted as meaning that the competent authority is permitted to grant to a plan or project development consent which leaves the developer free to determine later certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site.

*The 9th, 10th and 11th questions*

- 48 By its 9th, 10th and 11th questions, which can be dealt with together, the referring court seeks, in essence, to ascertain whether Article 6(3) of the Habitats Directive must be interpreted as meaning that, where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the ‘appropriate assessment’ must include an explicit and detailed statement of reasons capable of ensuring certainty that, notwithstanding such an opinion, there is no reasonable scientific doubt as to the environmental impact of the work envisaged on the site that is the subject of those findings.
- 49 It follows, in particular from the Court’s case-law in relation to Article 6(3) of the Habitats Directive, as summarised in paragraph 43 of the present judgment, that the assessment carried out under Article 6(3) of that Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned.
- 50 If there are no such conclusions capable of dispelling all reasonable doubt as to the adequacy of the information available, the assessment cannot be considered to be ‘appropriate’, within the meaning of Article 6(3) of the Habitats Directive.
- 51 In circumstances such as those in the main proceedings, that requirement entails that the competent authority should be in a position to state to the requisite legal standard the reasons



why it was able, prior to the granting of development consent, to achieve certainty, notwithstanding the opinion of its inspector asking that it obtain additional information, that there is no reasonable scientific doubt with respect to the environmental impact of the work envisaged on the site concerned.

- 52 In the light of the foregoing, the answer to the 9th, 10th and 11th questions is that Article 6 (3) of the Habitats Directive must be interpreted as meaning that, where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the ‘appropriate assessment’ must include an explicit and detailed statement of reasons, capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned.

#### *The EIA Directive*

- 53 While the request for a preliminary ruling refers to the amendments made by Directive 2014/52, it must be noted that, in accordance with Article 3(2) of that directive, those amendments are applicable only if certain procedural stages have been completed after 16 May 2017.
- 54 In the main proceedings, the contested decision was adopted on 11 July 2014.
- 55 It follows that examination of the questions relating to the EIA Directive must have regard to the original version of that directive.

#### *The fourth question*

- 56 By its fourth question, the referring court seeks, in essence, to ascertain whether Article 5 (1) and (3) of, and Annex IV to, the EIA Directive must be interpreted as meaning that they require the developer to supply information that expressly addresses the potentially significant impact on all the species identified in the statement that is supplied pursuant to those provisions.
- 57 Under Article 5(1) of the EIA Directive, the developer is to supply the information specified in Annex IV to that directive. Point 3 of that annex specifically prescribes in that regard that, included in the information to which Article 5(1) of the EIA Directive applies, there should be ‘a description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, ... fauna, flora, ... and the interrelationship between the above factors’. Article 5(3)(c) of that directive further requires the developer to include ‘the data required to identify and assess the main effects which the project is likely to have on the environment’.
- 58 As observed by the Advocate General in points 84 and 85 of her Opinion, it follows from those provisions that the obligation imposed does not extend to all effects on all species present, but is restricted to the significant effects, a concept to be interpreted in the light of Article 1(1) and Article 2(1) of the EIA Directive, according to which projects that are likely to have significant effects on the environment must be subject to an assessment of their effects.
- 59 In the light of the foregoing, the answer to the fourth question is that Article 5(1) and (3) of, and Annex IV to, the EIA Directive must be interpreted as meaning that the developer is obliged to supply information that expressly addresses the significant effects of its project on all species identified in the statement that is supplied pursuant to those provisions.

#### *The fifth, sixth and seventh questions*



- 60 By its fifth, sixth and seventh questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Article 5(3)(d) of the EIA Directive must be interpreted as meaning that the developer must supply information in relation to the environmental effects both of the chosen option and of all the main alternatives studied by the developer, together with the reasons for his choice, taking into account their environmental effects, even if such an alternative was rejected at an early stage.
- 61 In accordance with Article 3 of the EIA Directive, one of its objectives is to ensure that the effects of projects on the environment are identified, described and assessed.
- 62 In that regard, Article 5 of the EIA Directive lists the information, specified in Annex IV, that the developer is to supply in an appropriate form to the competent authorities, in order to enable the latter to carry out an environmental impact assessment with respect to the proposed project.
- 63 In particular, Article 5(3)(d) of the EIA Directive states that the developer must provide at least ‘an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects’.
- 64 It is stated explicitly in the wording of that provision that the developer is obliged to supply to the competent authorities an outline of the main alternatives studied by him and an indication of the main reasons for his choice, taking into account the environmental effects.
- 65 In that regard, first, it must be observed that the EIA Directive contains no definition of the concept of ‘main alternatives’, as referred to in Article 5(3)(d) of the EIA Directive. The Court must, however, hold, as did the Advocate General in points 94 and 95 of her Opinion, that the decisive factor, in order to identify those alternatives that should be regarded as ‘main’ alternatives, is whether or not those alternatives influence the environmental effects of the project. In that regard, the time when an alternative is rejected by the developer is of no relevance.
- 66 Further, since, according to Article 5(3)(d) of the EIA Directive, only an outline of those alternatives must be supplied, it must be held that that provision does not require the main alternatives studied to be subject to an impact assessment equivalent to that of the approved project. That said, that provision requires the developer to indicate the reasons for his choice, taking into account at least the environmental effects. One of the aims of imposing on the developer the obligation to outline the main alternatives is that reasons for his choice should be stated.
- 67 That obligation on the developer ensures that, thereafter, the competent authority is able to carry out a comprehensive environmental impact assessment that catalogues, describes and assesses, in an appropriate manner, the effects of the approved project on the environment, in accordance with Article 3 of the EIA Directive.
- 68 Last, it must be observed that the outline referred to in that provision must be supplied with respect to all the main alternatives that were studied by the developer, whether those were initially envisaged by him or by the competent authority or whether they were recommended by some stakeholders.
- 69 In the light of the foregoing, the answer to the fifth, sixth and seventh questions is that Article 5(3)(d) of the EIA Directive must be interpreted as meaning that the developer must supply information in relation to the environmental impact of both the chosen option and of all the main alternatives studied by the developer, together with the reasons for his choice,



taking into account at least the environmental effects, even if such an alternative was rejected at an early stage.

### Costs

- 70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that an ‘appropriate assessment’ must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site.**
2. **Article 6(3) of Directive 92/43 must be interpreted as meaning that the competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site.**
3. **Article 6(3) of Directive 92/43 must be interpreted as meaning that, where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the ‘appropriate assessment’ must include an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned.**
4. **Article 5(1) and (3) of, and Annex IV to, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, must be interpreted as meaning that the developer is obliged to supply information that expressly addresses the significant effects of its project on all species identified in the statement that is supplied pursuant to those provisions.**
5. **Article 5(3)(d) of Directive 2011/92 must be interpreted as meaning that the developer must supply information in relation to the environmental impact of both the chosen option and of all the main alternatives studied by the developer, together with the reasons for his choice, taking into account at least the environmental effects, even if such an alternative was rejected at an early stage.**

Delivered in open court in Luxembourg on 7 November 2018.


A. Calot Escobar

K. Lenaerts

Registrar

President

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 Language of the case: English.