

An Bord Achomharc Um Cheadúnais Dobharshaothraithe
Aquaculture Licences Appeals Board



Submission from Peter Sweetman

30 April 2018



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To the Chair and Members of the Board.

Firstly this development requires Appropriate Assessment Screening

The opinion of Advocate General Sharpston in CJEU Case C-258/11¹ states at;

49. The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site.

This is fully implemented into Irish law by;

Finlay Geoghegan J. in Kelly -v- An Bord Pleanála [2014] IEHC 400 (25 July 2014)²,

IF having been screened the development the development would then be subjected to Appropriate Assessment under Article 6.3 of the directive the criteria for this is as in the Decision in Case C-258/11³ which states at;

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).

If the Board were to find that spite of the 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.

This finding would have to be subject to the law as stated in the Opinion Of Advocate General Tanchev in Case C 164/17⁴ at;

63. In its judgment, the Court held that the proposed measures were not aimed at avoiding or reducing the significant adverse effects for that habitat type, but rather tended to compensate after the fact for those effects and thus did not guarantee that the project would not adversely affect the integrity of the site. (44) Moreover, the Court noted that 'as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future'. (45) Accordingly, the Court held that the proposed measures cannot be taken into account at the procedural stage provided for in Article 6(3) of the Habitats Directive. (46)

As this information is not available and in my opinion does not exist ALAB has no legal alternative but to refuse this application.

Yours faithfully

A handwritten signature in black ink, appearing to read "Peter Sweetman". The signature is written in a cursive, flowing style with some loops and flourishes.

Peter Sweetman

OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 22 November 2012 (1)

Case C-258/11

Peter Sweetman
Ireland
Attorney General
Minister for the Environment, Heritage and Local Government
v
An Bord Pleanála

(Reference for a preliminary ruling from the Supreme Court (Ireland))

(Environment – Special conservation areas – Assessment of the impact of a plan or project on a protected site – Adverse effect on the integrity of the site)

Introduction

1. This reference for a preliminary ruling concerns the interpretation of Article 6 of the Habitats Directive. (2) The particular issue before the Court involves the proper interpretation of paragraph 3 of that article, which relates to plans or projects not directly connected with or necessary to the management of a habitat site. That provision applies where such a plan or project is 'likely to have a significant effect' on the site. If so, there must be an appropriate assessment of the implications for the site. It is only where, following that assessment, the competent national authorities have ascertained that the plan or project will not 'adversely affect the integrity of the site' that they may agree to it. The national court seeks guidance on the meaning of the last of these phrases.

Legal framework

European Union ('EU') legislation

2. Article 1 of the Directive contains the following definitions:

'(a) "conservation" means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

...

(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 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
- the conservation status of its typical species is favourable as defined in (i);

...

(i) "conservation status" of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The conservation status will be taken as "favourable" when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

(j) "site" means a geographically defined area whose extent is clearly delineated;

(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.'

3. Article 2 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.'

4. Article 3(1) states:

'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.

...'

5. Article 4 lays down the procedure for the designation of habitat sites under the Directive. Essentially, this involves the preparation of a list of appropriate sites by each Member State, which is then transmitted to the Commission (Article 4(1)). On the basis of the information provided, the Commission is then, in agreement with each Member State, to prepare a draft list of sites of Community importance ('SCIs'), the purpose of which is to identify those hosting one or more priority natural habitat types or priority species. The list of selected sites is then to be adopted formally by the Commission (Article 4(2)). Once a site has been adopted as an SCI in accordance with the procedure laid down in paragraph 2, the Member State is to designate it as a special area of conservation ('SAC') within a period not exceeding six years (Article 4(4)). However, as soon as a site is placed on the list of sites adopted by the Commission as SCIs, it is to be subject to the obligations laid down in Article 6(2), (3) and (4) (Article 4(5)).

6. Article 6 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.'

7. Annex 1 to the Directive includes the following entry:

- '8240 * Limestone pavements'.

National law

8. Road developments in Ireland are subject to the provisions of the Roads Act 1993 (as amended). Sections 50 and 51 of that Act, together with the European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999, prescribe a development procedure for those projects. That procedure requires the carrying out of an environmental impact assessment for the purposes of Directive 85/337. (3)

9. In addition, if a road development is likely to have a significant effect on certain sites of ecological importance, it will be subject to the European Communities (Natural Habitats) Regulations 1997 (as amended) ('the Regulations'), which transpose the Directive into national law.

10. Regulation 2 of the Regulations defines a 'European site' so as to include sites which Ireland proposes to submit to the Commission for adoption as an SCI. Regulation 4 lays down a procedure for notifying sites within Ireland. Such sites are subsequently included in the list transmitted to the European Commission pursuant to Article 4(1) of the Directive.

11. Regulation 30 of the Regulations ('Regulation 30') provides:

'1. Where a proposed road development in respect of which an application for the approval of the Minister for the Environment 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 Minister for the Environment shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

...

3. The Minister for the Environment 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.

...

5. The Minister for the Environment may, notwithstanding a negative assessment and where that Minister 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.'

12. According to the national court, the effect of the domestic provisions is that protection equivalent to that laid down under Article 6(2), (3) and (4) of the Directive will apply to a site from the date on which affected owners and occupiers are notified of a proposal to include that site in a list to be transmitted to the Commission. Such protection will thus apply prior to

its inclusion on the list adopted by the Commission as an SCI pursuant to Article 4 of the Directive.

Facts, procedure and questions referred

13. By Decision 2004/813, (4) the Commission adopted a draft list of SCIs pursuant to Article 4(2) of the Directive. That list included a site comprising Lough Corrib and surrounding areas, situated in County Galway, Ireland. The total area of the site extended to some 20 582 hectares.

14. By Decision 2008/23, (5) the Commission repealed Decision 2004/813 and adopted a first updated list of SCIs. That list included the Lough Corrib site, with its area being unchanged.

15. In December 2006, the competent minister notified, within Ireland, an extended Lough Corrib site, comprising some 25 253 hectares. The extension amounted to roughly 4 760 hectares. The extended site includes 270 hectares of limestone pavement, which is a priority natural habitat type listed in Annex I to the Directive.

16. In December 2007, the extended site was included in a list of sites transmitted by Ireland to the Commission pursuant to Article 4(1) of the Directive.

17. By Decision 2009/96, (6) the Commission repealed Decision 2008/23 and adopted a second updated list of SCIs. That list included the extended Lough Corrib site.

18. In the meantime, An Bord Pleanála (the Irish Planning Board) ('the Board'), which is the competent national authority in Ireland for the purposes of Article 6 of the Directive, had adopted a decision ('the decision at issue') on 20 November 2008 to grant development consent to build a proposed road through part of the Lough Corrib site. The proposed road is known as the 'N6 Galway City Outer Bypass road scheme'. The part of the site through which the road is intended to pass falls within the extended area of 4 760 hectares referred to in point 15 above.

19. If the road development proceeds, 1.47 hectares of limestone pavement will be permanently lost. (7) That loss would occur within the extension of the site, which contains 85 of the 270 hectares of limestone pavement located within the entire Lough Corrib site.

20. Prior to the adoption of the decision at issue, the Board appointed an expert inspector to carry out an assessment of the environmental implications of (inter alia) the road development for the site. As part of his duties, he inspected the site over a period of nine months and held a hearing, which took place over a total of 21 days and at which interested parties were represented orally and/or in writing. On the basis of the inspection and the information and arguments presented at the hearing, the inspector produced a report and recommendations which he submitted to the Board. In that report, he took the view that the loss 'in the region of 1.5 hectares' of limestone pavement had to be considered in relation to the 85 hectares of pavement contained within the extension to the original Lough Corrib site – viewing that extension as a 'distinct sub-area' of the whole site – and not in the context of the 270 hectares of pavement contained within the site taken as a whole. He also noted that the area of limestone pavement that would fall to be removed as a result of the road scheme had been reduced by what he considered 'a significant amount' (from 3.8 hectares to 1.5 hectares) as a result of measures taken to mitigate the loss of pavement. As regards the loss itself, the inspector concluded that 'this relatively small loss would not, in terms of quantity, amount to an adverse effect on the integrity of the area'. In relation to issues of fragmentation and disturbance, he found that 'the proposed development would not seriously affect the achievement of the site's conservation objectives and would not seriously affect the integrity of the site'.

21. The inspector also concluded that 'the assessment of a severe negative magnitude of impact, allowing for appropriate mitigating measures' was not unreasonable. It is clear from the order for reference that in using the expression 'severe negative magnitude of impact' in his report, the inspector was following guidelines laid down by the Irish National Roads

Authority. The effect of those guidelines was to require that any permanent impact upon a site such as the Lough Corrib site be deemed 'severe negative'. The use of the expression should thus be seen as referring to the permanence of the impact.

22. In the decision at issue, the Board agreed with the inspector's assessment of the environmental impact of the project. The Board concluded that the development 'while having a localised severe impact on the Lough Corrib [site] would not adversely affect the integrity of the [site]. The development ... would not, therefore, have unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area'.

23. Mr Sweetman challenged the decision at issue before the High Court (Ireland), arguing in particular that the Board had been wrong to conclude that the road project would not adversely affect the integrity of the Lough Corrib site. Having lost that application at first instance, Mr Sweetman has lodged an appeal before the Supreme Court, which has referred the following questions 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 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?'

24. Written observations have been submitted by Mr Sweetman, the Board, Galway County Council and Galway City Council (together 'the Local Authorities'), Ireland, the United Kingdom Government and the European Commission. At the hearing on 12 September 2012, Mr Sweetman, the Board, the Local Authorities, Ireland, the Greek and United Kingdom Governments and the Commission were represented and made oral submissions to the Court.

Analysis

Admissibility

25. At the time of the decision at issue, the extension to the Lough Corrib site had been notified within Ireland pursuant to Regulation 4 of the Regulations but had not yet been included on the list of sites adopted by the Commission as an SCI. It was thus subject to protection laid down in Regulation 30 but not to that of Article 6(2), (3) and (4) of the Directive. (8) The Supreme Court was, I feel sure, fully aware of this point when it made the reference. The Local Authorities argue, however, that the questions referred therefore relate exclusively to the interpretation of national law and fall outwith the jurisdiction of the Court. The Court should accordingly decline to answer them.

26. In my view, such a narrow interpretation of Article 267 TFEU is not justified.

27. It is clear from the Court's case-law that it has jurisdiction to give preliminary rulings in cases that concern national legislation enacted with a view to implementing EU law, even though the situation in the main proceedings is not, as such, governed by that law.

28. That will be the case where the national provisions at issue seek to adopt the same solutions as those adopted in EU law, provided the provisions in question are made applicable under national law in a direct and unconditional way. The legislation must contain sufficiently precise indications from which it can be deduced that the national legislature intended to refer to the content of the EU provisions. The Court has justified that interpretation of Article 267 TFEU on the ground that, in order to forestall future differences of interpretation, provisions

or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply. (9)

29. That does not mean to say that the Court will accept jurisdiction to give a ruling in every case involving the application of national provisions based on EU law. Thus, in *Kleinwort Benson*, (10) it held that a reference was inadmissible on the ground that the domestic legislation at issue failed to contain 'a direct and unconditional *renvoi*' to the provisions of European law so as to incorporate them into the domestic legal order, but instead took those provisions as a model only. While, moreover, certain provisions of the domestic legislation were taken almost word for word from their European equivalent, others departed from it and express provision was made for the authorities of the Member State concerned to adopt modifications 'designed to produce divergence' from that equivalent.

30. While the scope of Regulation 30 is limited to proposals for road development, and is thus narrower than that of Article 6(3) and (4) of the Directive, it is none the less clear that it seeks to adopt the same solutions in that context as those envisaged by those provisions. Its application is both direct and unconditional. The title of the Regulations makes it apparent that they were enacted for the purpose of transposing European legislation into national law. (11)

31. Against that background, I am of the view that the need to forestall future differences of interpretation as between Regulation 30 of the Regulations and Article 6(3) of the Directive is paramount. Once a site has been included on the list of sites adopted by the Commission as SCIs, it is plain that Regulation 30, in its application to that site, will fall to be interpreted in accordance with Article 6(3). Equally, Regulation 30 must be interpreted and applied consistently under national law, whether or not the site in question has (yet) been so adopted. Consequently, the Irish courts must be sure, when interpreting Regulation 30 in a case where Article 6(3) does not (yet) apply, that they will not have to change that interpretation subsequently in a case where it does apply. (12)

32. The Local Authorities argue that the necessary European dimension is missing: as the site was not, at the relevant time, within the scope of Article 6(3), the Commission would not be competent to give an opinion for the purposes of Article 6(4). That point seems to me to be irrelevant. It does not detract in any way from the need to forestall the differences of interpretation referred to in point 31 above. Furthermore, if (on a correct interpretation of Regulation 30, read in the light of the Directive) the only way the development could proceed is by way of Article 6(4) of the Directive, it seems to me that Ireland would be obliged either to withdraw the site from the list of sites referred to in point 16 above (quite how it would do so is not clear) or wait until the site was designated and then approach the Commission under Article 6(4). But that is merely the logical consequence of aligning national law with the Directive's requirements in advance of the actual point at which Natura 2000 was established.

33. In the light of all of the above, it seems to me that the Supreme Court was entirely right to make a reference to this Court and it is appropriate that this Court should give a ruling.

Question 1

34. By this question, the national court seeks guidance on the interpretation of Article 6(3) and, in particular, the phrase 'adverse effect on the integrity of the site'.

35. As the Board pointed out at the hearing, this case is unusual in so far as much of the Court's previous case-law concerns situations where there has been no appropriate assessment in terms of that provision and the question is whether such an assessment is necessary. (13) Here, by contrast, an assessment was undertaken and there is no suggestion that it was improperly conducted – indeed, all the indications are that it was done with great care. (14) Rather, the issue concerns the conclusion reached as a result of that assessment, on the basis of which the Board adopted the decision at issue.

36. While the question covers a single expression used in Article 6(3), that expression must be understood having regard to the context in which it is used. I shall therefore consider

the objectives which the Directive sets out to achieve, before turning to the obligations laid down in Article 6 as a whole.

The objectives of the Directive

37. Article 2(1) states that the aim of the Directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild flora and fauna throughout the Member States. Article 2(2) goes on to provide that measures taken pursuant to the Directive must be designed to *maintain at or restore to*, a favourable conservation status, natural habitats and species of wild flora and fauna 'of Community interest'.

38. The term 'conservation' is defined in Article 1(a) as 'a series of measures required to maintain or restore ... natural habitats ... at a favourable status'. By Article 1(e), the conservation status of a natural habitat is to be taken as 'favourable' when, inter alia, the 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.

39. To that end, Article 3(1) requires the setting-up, under the 'Natura 2000' title, of a coherent European ecological network of special areas of conservation. That network is intended to enable, inter alia, the natural habitat types listed in Annex I to be maintained at or, where appropriate, restored to a favourable conservation status in their natural range.

40. It is thus an essential objective of the Directive that natural habitats be maintained at and, where appropriate, restored to a favourable conservation status. Such an aim is necessary in the context – recorded in the fourth recital in the preamble to the Directive – of a continuing deterioration in those habitats and the need to take measures in order to conserve them. That is *a fortiori* the case as regards priority natural habitat types. Article 1(d) defines these as 'natural habitat types in danger of disappearance', stating that the Community has 'particular responsibility' for their conservation.

Article 6

41. Article 6 falls to be construed against that background. As regards natural habitats, it provides for necessary conservation measures to be established in relation to SACs (Article 6(1)) and for steps to be taken to avoid the deterioration of those habitats (Article 6(2)), on the one hand, and sets out a series of procedures to be followed in the case of plans or projects that are not directly connected with or necessary to the management of the site (Article 6(3) and (4)), on the other. Without those provisions, the notions of maintenance and restoration on which the Directive is based would risk being of no practical effect.

42. Of the measures prescribed by Article 6, those laid down by the first paragraph, which relate to the establishment of conservation measures, are not directly relevant to the question. They exist, essentially, in order to ensure that positive steps are taken, on a more or less regular basis, in order to ensure that the conservation status of the site in question is maintained and/or restored.

43. Paragraphs 2, 3 and 4 of Article 6 serve a different purpose. Paragraph 2 imposes an overarching obligation to avoid deterioration or disturbance. Paragraphs 3 and 4 then set out the procedures to be followed in respect of a plan or project which is not directly connected with or necessary to the management of the site (and which is thus not covered by paragraph 1) but which is likely to have a significant effect thereon. Collectively, therefore, these three paragraphs seek to pre-empt damage being done to the site or (in exceptional cases where damage has, for imperative reasons, to be tolerated) to minimise that damage. They should therefore be construed as a whole.

44. Article 6(2) imposes a general requirement on the Member States to maintain the status quo. (15) The Court has described it as 'a provision which makes it possible to satisfy 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 and disturbance which could have significant effects in the light of the directive's objectives'. (16) The obligation Article 6(2) lays down is not an absolute one, in the sense that it imposes a duty to ensure that no alterations of any kind are made, at any time, to the site in question. Rather, it is to be measured having regard to the conservation objectives of the site, (17) since that is why the site is designated. The requirement is thus to take all appropriate steps to avoid those objectives being prejudiced. The authenticity of the site as a natural habitat, with all that that implies for the biodiversity of the environment, is thus preserved. Benign neglect is not an option.

45. Article 6(3), by contrast, is not concerned with the day-to-day operation of the site. It applies only where there is a plan or project not directly connected with or necessary to site management. It lays down a two-stage test. At the first stage, it is necessary to determine whether the plan or project in question is 'likely to have a significant effect [on the site]'.

46. I would pause here to note that, although the words 'likely to have [an] effect' used in the English-language version of the text (18) may immediately bring to mind the need to establish a degree of probability – that is to say that they may appear to require an immediate, and quite possibly detailed, determination of the impact that the plan or project in question might have on the site – the expression used in other language versions is weaker. Thus, for example, in the French version, the expression is 'susceptible d'affecter', the German version uses the phrase 'beeinträchtigen könnte', the Dutch refers to a plan or project which 'gevolgen kan hebben', while the Spanish uses the expression 'pueda afectar'. Each of those versions suggests that the test is set at a lower level and that the question is simply whether the plan or project concerned is capable of having an effect. It is in that sense that the English 'likely to' should be understood. (19)

47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). (20) The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may be* such an effect.

48. The requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having *any* effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.

49. The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the Court has termed 'the best scientific knowledge in the field'. (21) Members of the general public may also be invited to give their opinion. Their views may often provide valuable practical insights based on their local knowledge of the site in question and other relevant background information that might otherwise be unavailable to those conducting the assessment.

50. The test which that expert assessment must determine is whether the plan or project in question has 'an adverse effect on the integrity of the site', since that is the basis on which the competent national authorities must reach their decision. The threshold at this (the second) stage is noticeably higher than that laid down at the first stage. That is because the question (to use more simple terminology) is not 'should we bother to check?' (the question at the first stage) but rather 'what will happen to the site if this plan or project goes ahead; and is that consistent with "maintaining or restoring the favourable conservation status" of the habitat or species concerned?'. There is, in the present case, no dispute that if the road scheme is to proceed a part of the habitat will be permanently lost. The question is simply whether the scheme may be authorised without crossing that threshold and bringing into play the remaining elements of Article 6(3) (and, if necessary, Article 6(4)).

51. It is plain, however, that the threshold laid down at this stage of Article 6(3) may not be set too high, since the assessment must be undertaken having rigorous regard to the precautionary principle. That principle applies where there is uncertainty as to the existence or extent of risks. (22) The competent national authorities may grant authorisation to a plan or project *only if they are convinced that it will not adversely affect the integrity of the site concerned*. If doubt remains as to the absence of adverse effects, they must refuse authorisation. (23)

52. How should the reference in that expression to the 'integrity' of the site be construed?

53. Here, again, it is worth pausing briefly to note the differing language versions of Article 6(3). The English-language version uses an abstract term (integrity) – an approach followed, for example in the French (*intégrité*) and the Italian (*integrità*). Some other language versions are more concrete. Thus, the German text refers to the site 'als solches' (as such). The Dutch version speaks of the 'natuurlijke kenmerken' (natural characteristics) of the site.

54. Notwithstanding those linguistic differences, it seems to me that the same point is in issue. It is the essential unity of the site that is relevant. To put it another way, the notion of 'integrity' must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned.

55. The integrity that is to be preserved must be that 'of the site'. In the context of a natural habitat site, that means a site which has been designated having regard to the need to maintain the habitat in question at (or to restore it to) a favourable conservation status. That will be particularly important where, as in the present case, the site in question is a priority natural habitat. (24)

56. It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is 'why was *this particular site* designated and what are its conservation objectives?'. In the present case, the designation was made, at least in part, because of the presence of limestone pavement on the site – a natural resource in danger of disappearance that, once destroyed, cannot be replaced and which it is therefore essential to conserve.

57. Lastly, the effect on the integrity of the site must be 'adverse'. In any given case, the second-stage appropriate assessment under Article 6(3) may determine that the effect of the plan or project on the site will be neutral, or even beneficial. But if the effect is negative, it cannot proceed – by virtue of that provision, at least.

58. What then is a negative or 'adverse' effect? Here, it may be helpful to distinguish between three situations.

59. A plan or project may involve some strictly temporary loss of amenity which is capable of being fully undone – in other words, the site can be restored to its proper conservation status within a short period of time. An example might be the digging of a trench through earth in order to run a subterranean pipeline across the corner of a site. *Provided* that any disturbance to the site could be made good, there would not (as I understand it) be an adverse effect on the integrity of the site.

60. Conversely, however, measures which involve the permanent destruction of a part of the habitat in relation to whose existence the site was designated are, in my view, destined by definition to be categorised as adverse. The conservation objectives of the site are, by virtue of that destruction, liable to be fundamentally – and irreversibly – compromised. The facts underlying the present reference fall into this category.

61. The third situation comprises plans or projects whose effect on the site will lie between those two extremes. The Court has not heard detailed argument as to whether such plans or projects should (or should not) be considered to generate an 'adverse effect on the integrity of the site'. I consider that it would be prudent to leave this point open to be decided in a later case.

62. Let us assume that a plan or project crosses the threshold laid down in the second sentence of Article 6(3). It is then necessary to consider whether it may proceed under Article 6(4). That provision is triggered by 'a negative assessment for the implications of the site'. Those words must, if Article 6 is to have any sense as a coherent whole, be interpreted so as to mean that paragraph 4 will cut in precisely where paragraph 3 ends, that is to say, once it is found that the plan or project in question cannot proceed under Article 6(3).

63. Article 6(4) is, like Article 6(3), divided into two parts. The first applies to any plan or project which fails to satisfy the requirements of Article 6(3). The second applies only where the site concerned hosts a priority natural habitat type or a priority species.

64. As regards the first – general – set of requirements, the plan or project may proceed only if that is for imperative reasons of overriding public interest and there is no alternative solution. (25) In addition, the Member State concerned must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. While the Commission must be informed of the compensatory measures adopted, it does not, as such, participate in the procedure. The legislation recognises, in other words, that there may be exceptional circumstances in which damage to or destruction of a protected natural habitat may be necessary, but, in allowing such damage or destruction to proceed, it insists that there be full compensation for the environmental consequences. (26) The status quo, or as close to the status quo as it is possible to achieve in all the circumstances, is thus maintained.

65. The second part is narrower. The grounds on which the plan or project may proceed are more limited and it may be necessary for the competent authorities of the Member State concerned to obtain an opinion from the Commission before proceeding. (27)

66. Whilst the requirements laid down under Article 6(4) are intentionally rigorous, it is important to point out that they are not insuperable obstacles to authorisation. The Commission indicated at the hearing that, of the 15 to 20 requests so far made to it for delivery of an opinion under that provision, only one has received a negative response.

67. Seen in that overall context, it seems to me that any interpretation of Article 6(3) that provides a lower level of protection than that which Article 6(4) contemplates cannot be correct. To require the Member States to 'take all compensatory measures necessary' when a plan or project is carried out under the latter provision so as to preserve the overall coherence of Natura 2000 while, at the same time, allowing them to authorise more minor projects to proceed under the former provision even though some permanent or long-lasting damage or destruction may be involved would be incompatible with the general scheme which Article 6 lays down. Such an interpretation would also fail to prevent what the Commission terms the 'death by a thousand cuts' phenomenon, that is to say, cumulative habitat loss as a result of multiple, or at least a number of, lower level projects being allowed to proceed on the same site. (28)

68. The above analysis essentially endorses the line of reasoning put forward by Mr Sweetman, Ireland and the Commission. The Board, the Local Authorities and the United Kingdom adopt a different approach, based closely on the literal wording of Article 6(3). In particular, they emphasise the two-stage process which that provision imposes. Each stage is separate and, they argue, must be understood as having a separate meaning and purpose.

69. I would summarise that alternative approach as follows.

70. In construing Article 6, a line is to be drawn between paragraphs 1 and 2, on the one hand, and paragraphs 3 and 4, on the other. The former exist to govern the day-to-day management of the site. The latter, for their part, deal with plans or projects that are unconnected with that management. They may thus be seen as laying down exceptions to paragraphs 1 and 2. In considering such a plan or project, it is necessary, first, to consider whether it is likely to have a significant effect on the site. The word 'likely' would be construed in that context as comprising a test of probability (albeit based on the precautionary principle – I do not think there is any dispute in that regard). A plan or project that was not considered likely to have a significant effect could proceed, without there being any need for an assessment of its implications.

71. Conversely, where such an effect was predicted, an assessment would be required. In conducting that exercise, and thus determining whether the plan or project 'adversely affects the integrity of the site', it would be necessary to bear in mind that that expression must mean more than 'adversely affects the site'. Equally, the expression 'adverse effect' must be understood as carrying a stronger meaning than the phrase 'significantly affect' used in the first stage of Article 6(3). If that were not the case, there would be no distinction between the trigger for deciding whether an assessment is required (Article 6(3), first sentence) and the criterion for determining whether a plan or project must be refused permission to proceed (Article 6(3), second sentence).

72. On that basis, the Board argues that the decision to authorise the road scheme at issue in the main proceedings was correctly adopted.

73. The submissions of the parties arguing in support of the approach I have just described are well made. They should certainly not be dismissed out of hand.

74. However, in my view, that approach is not the correct one. In particular, it concentrates on the wording of Article 6(3) read in isolation and fails to take into account the wider context in which that provision must be construed. As a result, it involves an inherent, and irresolvable, tension between allowing certain projects to proceed under Article 6(3), while projects covered by Article 6(4) may go ahead only if full compensatory measures are adopted. It also fails in any way to deal with the 'death by a thousand cuts' argument.

75. Those arguments likewise cannot be reconciled with the Court's case-law laid down in *Waddenvereniging and Vogelbeschermingsvereniging*. (29) In holding, in paragraph 35, that Article 6(3) renders superfluous a concomitant application of the rule of general protection laid down in Article 6(2), the Court was not seeking to stress the differences between those provisions. Rather, it chose to emphasise their *similarity*. It was with that point in mind that it went on to observe, in paragraph 36, that 'authorisation of a plan or project granted in accordance with Article 6(3) of [the Directive] necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2)'. It was for the same reason that the Court held in *Commission v Spain* that Article 6(2) and (3) of the Directive is 'designed to ensure the same level of protection'. (30)

76. In the light of all of the above, the answer to Question 1 should be that in order to establish whether a plan or project to which Article 6(3) of the Directive applies has an adverse effect on the integrity of a site, it is necessary to determine whether that plan or project will have a negative effect on the constitutive elements of the site concerned, having regard to the reasons for which the site was designated and their associated conservation objectives. An effect which is permanent or long lasting must be regarded as an adverse one. In reaching such a determination, the precautionary principle will apply.

Question 2

77. By this question, the national court asks whether the precautionary principle requires authorisation of a plan or project to be refused if it would result in the permanent non-renewable loss of the whole or any part of the natural habitat in question. It is implicit in the question that the principle concerned may have a separate role to play in the assessment to be carried out by the national authorities under Article 6(3). That is to say, it assumes that, if the principle is not called in aid, a different result might be reached than if it is.

78. I have described the application of the precautionary principle in point 51 above. It is, as the Local Authorities observe, a procedural principle, in that it describes the approach to be adopted by the decision-maker and does not demand a particular result.

79. The Court held in *Waddenvereniging and Vogelbeschermingsvereniging* that the precautionary principle has been integrated into Article 6(3). (31) It follows, as the United Kingdom observes, that there is no interpretational gap in the scheme of that article to be filled by the application of that principle. It also follows that the fact that the principle is

relevant to establishing whether a competent authority can rule out any adverse effect on the integrity of a site does not go to the prior question of what that test means.

80. It is therefore unnecessary to answer Question 2.

Question 3

81. By this question, the national court asks about the interrelationship between paragraphs 3 and 4 of Article 6.

82. I have set out my analysis of that relationship above (32) and have nothing to add.

Conclusion

83. In the light of the above considerations, I suggest that the Court should give the following answer to the questions referred by the national court:

In order to establish whether a plan or project to which 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 applies has an adverse effect on the integrity of a site, it is necessary to determine whether that plan or project will have a negative effect on the constitutive elements of the site concerned, having regard to the reasons for which the site was designated and their associated conservation objectives. An effect which is permanent or long lasting must be regarded as an adverse one. In reaching such a determination, the precautionary principle will apply.

1 – Original language: English.

2 – 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, with corrigendum OJ 1993 L 176, p. 29) ('the Directive').

3 – Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

4 – Commission Decision 2004/813/EC of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region (OJ 2004 L 387, p. 1).

5 – Commission Decision 2008/23/EC of 12 November 2007 adopting, pursuant to Council Directive 92/43/EEC, a first updated list of sites of Community importance for the Atlantic biogeographical region (OJ 2008 L 12, p. 1).

6 – Commission Decision 2009/96/EC of 12 December 2008 adopting, pursuant to Council Directive 92/43/EEC, a second updated list of sites of Community importance for the Atlantic biogeographical region (OJ 2009 L 43, p. 466).

7 – The Commission asserts that this figure is inaccurate and underestimates the area of limestone pavement that would be sacrificed. That point is not, however, raised either explicitly or by implication in the order for reference. To the extent that the point concerns a question of fact, the Court is unable to address it. To the extent that the Commission’s arguments on the point raise questions of interpretation – and hence of law – those questions do not fall within the framework of the questions posed by the referring court, nor do they require to be answered in order to address those questions. I therefore do not consider them further.

8 – The decision at issue was dated 20 November 2008. The Commission’s decision to include the extended site on the updated list of SCIs was adopted on 12 December 2008, that is to say, some three weeks after the date of the decision at issue.

9 – See generally, in that regard, Case C-482/10 *Cicala* [2011] ECR I-14139, paragraphs 17 to 19.

10 – Case C-346/93 [1995] ECR I-615, paragraph 16.

11 – See, in that regard, Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10627, paragraph 22.

12 – As, indeed, it now does to the extended Lough Corrib site.

13 – See, for example, Case C-179/06 *Commission v Italy* [2007] ECR I-8131; Case C-241/08 *Commission v France* [2010] ECR I-1697; Case C-226/08 *Stadt Papenburg* [2010] ECR I-131; and Case C-182/10 *Solvay and Others* [2012] ECR.

14 – See points 20 to 22 above.

15 – See inter alia, in that regard, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 32; Case C-535/07 *Commission v Austria* [2010] ECR I-9483, paragraph 58; and Case C-404/09 *Commission v Spain* [2011] ECR I-11853, paragraph 127.

16 – See *Stadt Papenburg*, cited in footnote 13 above, paragraph 49 and the case-law cited.

17 – See, in that regard, *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above, paragraph 46.

18 – When the Directive was adopted in May 1992, the official languages of the European Community were Danish, German, Greek, English, Spanish, French, Italian, Dutch and Portuguese. The text of the Directive will thus be authentic in each of those language versions.

19 – See Case C-1/02 *Borgmann* [2004] ECR I-3219 as regards the need to construe a provision by reference to the purpose and general scheme of the rules of which it forms part where there is a divergence between the different language versions of an EU measure (paragraph 25 and the case-law cited). See also, as regards the difficulties that differences in language versions can give rise to, my Opinion in Case C-173/07 *Emirates Airlines* [2008] ECR I-5237.

20 – An example of the type of confusion that this poorly-drafted piece of legislation can give rise to can, I suggest, be seen in the judgment in *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above. In paragraph 41, the Court talks of an appropriate assessment being required if there is a 'mere probability' that there may be significant effects. In paragraph 43, it refers to there being a 'probability or a risk' of such effects. In paragraph 44, it uses the term 'in case of doubt'. It is the last of these that seems to me best to express the position.

21 – *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above, paragraph 54.

22 – Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 63.

23 – See, in that regard, *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above, paragraphs 56 to 59.

24 – See, in that regard, point 40 above.

25 – See, in that regard, *Solvay and Others*, cited in footnote 13 above, paragraph 71 et seq.

26 – For an example of steps that do *not* constitute adequate compensatory measures, see point 29 of my Opinion in Case C-388/05 *Commission v Italy* [2007] ECR I-7555, '*Valloni e steppe pedegarganiche*'. I leave open the general question as to how to identify what *are* appropriate compensatory measures in any given case.

27 – The legislation refers to the Commission’s conclusions being delivered by way of an opinion rather than a decision. They will thus not be directly binding on the parties concerned. It will none the less be open to the Commission to take enforcement action against a Member State which contravenes, or allows others to contravene, its opinion. Alternatively, an aggrieved third party may bring proceedings before a national court seeking an order to the appropriate effect.

28 – Some of the discussion at the hearing turned on whether that phenomenon was one which played a role in determining whether the ‘adverse effect on the integrity of the site’ test under Article 6(3) was met. In my view, it has no role to play in that context. The criteria that are relevant there are those set out in points 50 to 60 above. It is not necessary to go beyond them.

29 – Cited in footnote 15 above. Where a plan or project subsequently proves likely to give rise to deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error, Article 6(2) will apply so as to ensure that the integrity of the site is restored (see, to that effect, paragraph 37 of the judgment).

30 – Cited in footnote 15 above, paragraph 142.

31 – Cited in footnote 15 above, paragraph 58.

32 – See point 62 et seq.

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THE HIGH COURT

[2013 No. 802 J.R.]

BETWEEN

EAMON (TED) KELLY

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

ROSCOMMON COUNTY COUNCIL, GALETECH ENERGY DEVELOPMENTS LIMITED, SKY VALLEY CONCERNED RESIDENTS GROUP, WIND TURBINE ACTION GROUP SOUTH ROSCOMMON, THE DEPARTMENT OF ARTS, HERITAGE AND THE GAELTACHT, SKY VALLEY WIND COMPANY, THE HERITAGE COUNCIL AND THE COMMISSION FOR ENERGY REGULATION, PAUL DONOHUE, JAMES FRANCIS FALLON, THOMAS BURKE, MARIA DONNELLY, TOM AND FIONA FARRELL, LIAM KILDEA SKY VALLEY CONCERNED RESIDENTS GROUP, THE HERITAGE COUNCIL AND THE COMMISSION FOR ENERGY REGULATION

NOTICE PARTIES

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 25th day of July 2014.

1. The applicant, supported by one notice party, namely, the Department of Arts, Heritage and the Gaeltacht ("the Department") in this judicial review, seeks, by way of primary relief orders of *certiorari*, to quash two decisions of the respondent to grant planning permission for wind turbine developments in County Roscommon. The challenged decisions are:

"(1) A decision made on the 9th of September, 2013, to grant permission for a development comprising sixteen wind turbines with a hub height of 85m, rotor diameter of 100m at Croan, Gortaphuill, Mullaghardagh, Dysart, County Roscommon (Appeal Reference PL20.239759 Planning Register Ref. 10/541) ("Phase 1 Decision").

(2) A decision made on the 13th of September, 2013, to grant planning permission for a development comprising nineteen wind turbines with a hub height of 85m, rotor diameter of 100m and overall height of 135m and 85m anemometer mass and 110kv substation a Milltown, Skeavally, Tawnagh, Tobermacloghlin, County Roscommon (Appeal ref. PL20.241069 Planning Register Ref. 11/273) ("Phase 2 Decision").

2. Galetch Energy Developments Ltd. ("Galetch"), a notice party, is the applicant for the planning permissions that are the subject of the Phase 1 and Phase 2 Decisions. It supports the respondent, An Bord Pleanála ("the Board") in opposing the present application.

3. As appears, the applications for planning permission relate to two developments of wind turbines in County Roscommon. The applicant is resident in Dysart, County Roscommon, is the Chairman of a group of local residents called the Wind Turbine Action Group South Roscommon and was an appellant before the Board in relation to each appeal.

Background

4. In 2010, Galetch applied for planning permission for a development comprising 16 wind turbine at Dysart, County Roscommon. In 2011, it applied for permission for the development of 19 wind turbines at Milltown, Skeavally, County Roscommon. The two developments are in the same vicinity and are contended by the applicant to comprise two phases of the same development. They will be referred to as Phase 1 and Phase 2 in this judgment. Roscommon County Council granted permissions for the two developments and appeals were made to the Board.

5. The proposed developments are in the vicinity of a number of European sites, both Special Areas of Conservation (SAC) and Special Protection Areas (SPA). There are ten conservation sites within 10km of the Phase 1 site. These include three Natura 2000 sites, Loughcroan SAC, Four Road Turlough CSAC and the River Suck Callows SPA. Those sites have important numbers of wetland and water birds, including Whooper Swan, Golden Plover and Greenland White Fronted Geese, all Annex 1 species. Within 15km of the Phase 2 site, there are 14 Natura sites including the three Natura 2000 sites already mentioned.

6. The Board appointed a Planning Inspector to prepare a report on the appeal in relation to Phase 1, Ms. Kelly. Ms. Kelly reported on 11th March, 2012. She recommended refusal of planning permission.

7. The Board appointed Ms. MacGabhann as Inspector in relation to the Phase 2 appeal. Ms. MacGabhann reported on 6th February, 2013. She also recommended refusal of planning permission.

8. The Board considered each of the appeals at a meeting of the Board held on 8th August, 2013, and decided by a majority of 4:1 to grant permission for each of the proposed developments in accordance with

reasons, considerations and decisions set out in the respective written decisions. It is those decisions, and the procedure leading to them, that are the subject matter of the present application for judicial review.

Grounds of Challenge

9. The applicant has delivered a lengthy and detailed statement of grounds. Pursuant to directions of the Court, it summarised the legal grounds upon which relief is sought as follows:

- "(1) The Environmental Impact Statements (EIS) accompanying the applications for planning permission were inadequate and did not meet the requirements of national and European law. The Board erred in law in considering the statements to be adequate and proceeding to grant permission.
- (2) The Natura Impact Statements (NIS) accompanying the applications for permission were inadequate and did not meet the requirements of national and European law. The Board erred in law in considering the statements to be adequate and proceeding to grant permission.
- (3) The Board failed to carry out a proper environmental impact assessment of the proposed development as is required under Irish and European law.
- (4) The Board failed to carry out a proper appropriate assessment of the proposed development as is required under Irish and European law.
- (5) The Inspectors in each appeal recommended a refusal of permission for the proposed development, the Board erred in failing to have any or any proper regard to these recommendations and in particular the scientific doubt expressed in these recommendation.
- (6) The Board failed to properly or at all record its conclusions or to give any or any proper statement of its reasons or considerations contrary to national and European law.
- (7) The Board erred in applying an incorrect test in its purported appropriate assessment.
- (8) The Board's decision was irrational."

10. At the hearing, counsel indicated that the applicant was not pursuing grounds (1) and (2).

11. The Department supports the applicant on his grounds of challenge which relate to compliance with the requirements of the Council Directive 92/43/EEC (as amended) (the "Habitats Directive") and the relevant implementing national legislation identified in grounds (4), (5), (6) and (7) above.

12. As appears, the primary ground relied upon by both the applicant and the Department is that the decisions of the Board to grant each planning permission were made in breach of the requirements of Article 6(3) of the Habitats Directive as transposed into national law by Part XAB of the Planning and Development Act 2000 (as amended) ("the PDA"). The main contention is that the Board, as competent authority, failed to carry out an appropriate assessment in either appeal in accordance with Article 6(3) and the decisions of the Court of Justice of the European Union (CJEU), or to give reasons for the determination made in the course of the purported appropriate assessments.

13. The applicant pursued ground (3) in relation to the alleged failure by the Board to carry out an environmental impact assessment as required by Directive 2011/92/EU ("EIA Directive") as implemented by the PDA.

14. Whilst I propose, initially, considering the grounds which relate to the alleged breach of the requirements of Article 6(3) of the Habitats Directive, as transposed into Irish law, it is necessary to set out in summary all relevant parts of the Statutory Scheme which applied to the challenged decisions taken by the Board to consider appropriately the Board decisions.

Statutory Framework

15. The ultimate decisions taken by the Board on the appeals were whether or not to grant planning permission for the developments that were the subject of each of the appeals pursuant to s. 37 of the PDA. In taking those decisions, by reason of the nature and location of the proposed developments, there were

three separately identifiable requirements deriving from Statute (in part enacted to give effect to EU obligations) with which the Board had to comply:

- (i) Consideration of what might be termed normal or general planning requirements under the PDA and compliance with its procedural requirements; and
- (ii) The carrying out of an environmental impact assessment required by the EIA Directive as implemented by Part X of the PDA; and
- (iii) The carrying out of an appropriate assessment as required by Article 6(3) of the Habitats Directive implemented by Part XAB of the PDA including making a determination.

Planning Requirements

16. The Board assigned an Inspector to report to it on each appeal pursuant to s. 146(1) of the PDA. The Inspector's Report must include a recommendation to the Board, which it is obliged to consider before determining the appeal (s. 146(2)).

17. In accordance with s. 34(10) of the PDA, the Board must state the main reasons and considerations on which the decision is based. Also, as where, in this case, the decision on the appeal is different to the recommendation in the Inspector's Report, the decision of the Board must "indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission".

Environmental Impact Assessment

18. Where, as on the facts of these appeals, the Board is also obliged to carry out an environmental impact assessment (EIA), the obligations imposed on it by the EIA Directive, as implemented, are set out in Part X of the PDA. Section 171A(1) defines an environment impact assessment, for the purposes of Part X, as:

"An assessment which includes an examination, analysis and evaluation carried out by . . . the Board . . . in accordance with this Part and Regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:

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

19. Section 172(1H) permits the Board, in carrying out an EIA, to "have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers". This includes its Inspector's Reports.

20. Section 172(1J) obliges the Board, when it has decided whether to grant or refuse consent for the proposed development, to inform the applicant and the public of the decision and to make the following information available to them:

- "(a) The contents of the decision and any conditions attaching thereto;
 - (b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;
 - (c) having examined any submission or observation validly made:
- (i) the main reasons and considerations on which the decision is based and

(ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by members of the public;

(d) where relevant, description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;

(e) any report referred to in sub-section (1H);

(f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and

(g) the views, if any, furnished by other Member States of the European Union pursuant to s. 174."

21. The definition of an EIA as being "an examination, analysis and evaluation" carried out by the Board and the obligation of the Board pursuant to s. 172(1J)(b) to make available to the public its evaluation of the direct and indirect effects of the proposed development on the matters set out in s. 171A are of particular relevance to the matters in dispute.

Appropriate Assessment

22. In these appeals, the third statutory requirement imposed on the Board relates to its obligations and in particular the carrying out of an appropriate assessment pursuant to Article 6 of the Habitats Directive as implemented by Part XAB of the PDA. There is some dispute as to the extent of the obligations imposed and in particular the nature of the reasons which must be given by the Board.

23. Whilst the provisions of Part XAB are more detailed than Article 6 of the Habitats Directive, it was common case between the parties at the hearing that they are intended to and do impose similar obligations on the Board to those imposed by Article 6(3) of the Habitats Directive as construed by reference to the case law of the CJEU.

24. Article 6 of the Habitats Directive, insofar as relevant, provides:

"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."

25. As appears Article 6(3) envisages a two-stage process which is implemented in greater detail by ss. 177U and 177V of the PDA:

(i) a screening for appropriate assessment in accordance with s. 177U;

(ii) if, on a screening, the Board determines that an appropriate assessment is required then it

must carry out an appropriate assessment in accordance with s. 177V.

26. There is a dispute between the parties as to the precise obligations imposed on the Board in relation to the stage 1 screening by s.1777U but its resolution is not strictly necessary in these proceedings. There is agreement on the nature and purpose of the screening process which is well explained by Advocate General Sharpston in Case C-258/11 *Sweetman* at paras 47-49:

"47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may be* such an effect.

48. The requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having *any* effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.

49. The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken on the implications of the plan or project for the conservation objectives of the site [. . .]"

27. The applicant submitted that s. 177U is mandatory and obliges the Board to carry out a screening and make a formal determination as to whether or not an appropriate assessment is required in all cases, and that it did not do so in the appeals, the subject matter of these proceedings. The Board in response does not assert that it conducted a stage 1 formal screening but disputes that it was under an obligation to carry out a screening and issue a formal determination in circumstances where the planning applications were accompanied by a Natura impact statement. It referred to s. 177U(6)(c) and submitted that this is intended to reflect the practical reality of the situation which pertains in these appeals where the requirement to carry out a full appropriate assessment had been established before the planning authority.

28. Sub-sections 177U(1) and (2), in their terms, impose a mandatory obligation on a competent authority, such as the Board, to carry out screening for appropriate assessment before consent is given for a proposed development. These sub-sections, insofar as relevant, provide:

"177U. - (1) A screening for appropriate assessment of . . . [an] application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that . . . proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site.

(2) A competent authority shall carry out a screening for appropriate assessment under subsection (1) before-

(a) . . .

(b) consent for a proposed development is given."

Sub-section (3) permits the competent authority to request information from the applicant to enable it carry out the screening. Sub-sections (4) and (5) set out the determinations which may be made by the Board in that screening process in the following terms:

"(4) The competent authority shall determine that an appropriate assessment . . . of a proposed development, . . . is required if it cannot be excluded, on the basis of objective information, that the . . . proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.

(5) The competent authority shall determine that an appropriate assessment of . . . a proposed development, . . . is not required if it can be excluded, on the basis of objective information, that

the . . . proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.”

29. Sub-section (6) then provides for the notification of a determination made by a competent authority. However, it only expressly requires notification to be given where a competent authority makes a determination that an appropriate assessment is required. When it does so, it must give notice of the determination, including reasons for the determination to the applicant, persons who have made submissions or observations and a party to an appeal. However, sub-section (c) then provides “paragraph (a) shall not apply in a case where the application for consent for the proposed development was accompanied by a Natura impact statement”.

30. Whilst the above statutory scheme appears in its express terms to impose a mandatory obligation under sub-sections (1) and (2) on the Board to carry out a screening for appropriate assessment prior to giving consent for a all proposed developments, sub-section (6), in its express terms, only appears to require notice of its determination with reasons to be given to certain persons where it reaches a positive conclusion that an appropriate assessment is required and then relieves the Board of giving notice of its determination in circumstances where the application for consent was accompanied by a Natura impact statement. As I have already observed, it is not necessary, for the determination of this judicial review application, to decide the proper construction of these provisions as the Board accepted an appropriate assessment was required. It is, however, relevant to the subsequent issues in dispute in relation to the nature of the full appropriate assessment which must be carried out and the reasons which must be given therefor, to note that an appropriate assessment is the second stage of a two-stage process and only arises where the first stage or screening process has either determined (or it was at least implicitly accepted) that the proposed development, alone or in combination with other plans or projects, is likely to have a significant effect on a European site within the meaning of the low threshold set out by Advocate General Sharpston in *Sweetman*.

31. Unlike, in the case of an environmental impact assessment, s. 177V does not contain a stand alone definition of an “appropriate assessment”. Sub-section 177V(1) provides that “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 . . . proposed development would adversely affect the integrity of a European site”. The Board is the competent authority for the purposes of Part XAB in relation to a planning appeal. If as expressly required by s.177V(1) the determination to be made as part of the appropriate assessment is to meet the requirements of Article 6.3 of the Habitats Directive, it follows that the full appropriate assessment must meet the requirements of Article 6(3) of the Habitats Directive as construed in CJEU case law.

32. Sub-section 177V(1) also expressly requires the appropriate assessment to be carried out before consent is given for a proposed development. Further Sub-section (3) provides that “Notwithstanding any other provision in this Act [and other named Acts]”, the Board shall give consent to a proposed development only after having determined that the . . .proposed development shall not adversely affect the integrity of a European site”. Sub-section (4) then “subject to the other provisions of the Act” permits consent to be given where modifications or conditions are attached and the Board has determined that “the proposed development would not adversely affect the integrity of the European site if it is carried out in accordance with the consent and the modifications or conditions attaching thereto. On the facts herein no such determination was made in either appeal and s.177V(4) is not relevant to the issues to be determined.

33. As appears, the respective effects on the decision making process of the Board of the environmental impact assessment and the appropriate assessment (where both have to be carried out by the Board prior to taking its planning decision) are quite different. In carrying out an environmental impact assessment, the Board is required to conduct an examination, analysis and evaluation of and identify the direct and indirect effects of the proposed developments on the matters specified in section 171A(1). However, the outcome of that examination, analysis, evaluation and identification informs rather than determines the planning decision which should or may be made. The Board has jurisdiction in its discretion to grant consent regardless of the outcome of the EIA though of course it impacts on how it should exercise its discretion.

34. In contrast, the Board, in carrying out an appropriate assessment under Article 6(3) and s.177V, is obliged, as part of same, to make a determination as to whether or not the proposed development would adversely affect the integrity of the relevant European site or sites in view of its conservation objectives. The determination which the Board makes on that issue in the appropriate assessment determines its jurisdiction to take the planning decision. Unless the appropriate assessment determination is that the proposed

development will not adversely affect the integrity of any relevant European site, the Board may not take a decision giving consent for the proposed development unless it does so pursuant to Article 6(4) of the Habitats Directive. It is agreed that the decisions made by the Board herein were not taken pursuant to Article 6(4) of the Habitats Directive. Hence, for the purposes of these appeals, the Board was precluded from granting consent for the proposed developments unless, having conducted an appropriate assessment in accordance with Article 6(3), as construed by the CJEU, it reached a determination that the proposed development will not adversely affect the integrity of the European sites.

Nature of Appropriate Assessment

35. The requirements of an appropriate assessment and of the legal test that the proposed development "will not adversely affect the integrity of a European site" have been considered by the CJEU in a number of cases. In *Waddenzee (Case C-127/02)* [2004] ECR I-7405, at para. 61 of its judgment, it stated:

"... under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."

36. This formulation as to the nature of the obligations imposed under Article 6(3) of the Habitats Directive has been affirmed and expanded upon in subsequent decisions of the CJEU. In *Commission v. Spain (Case C-404/09)* [2011] E.C.R. I-11853, the CJEU referred again to the obligation to identify the affects of the proposed development on the European sites conservation objectives "in the light of the best scientific knowledge in the field" and referred again to the test that "no reasonable scientific doubt remains as to the absence of such effects". At paras. 99 and 100, the CJEU stated:

"99. Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives 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 the case where no reasonable scientific doubt remains as to the absence of such effects (see, in particular, *Commission v Ireland*, at paragraph 243).

100. An assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned (see, to that effect, *Case C-304/05 Commission v Italy* [2007] ECR I-7495, paragraph 69."

37. More recently, the CJEU, in *Sweetman (Case C-258/11)*, provided further guidance as to what is required of an appropriate assessment at para. 44 where it stated:

"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."

38. Whilst all parties accepted for an appropriate assessment to be lawful it must comply with the requirements set out by the CJEU, as summarised in the above extracts from the relevant judgments, there was some dispute as to what was required by reason, in particular, of the wording of s. 177V(1) which only provides that it shall "include" a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not "... a proposed development would adversely affect the integrity of a

European site” and the absence of any provision analogous to the definition of an environmental impact assessment as contained in section 171A(1) that such an assessment must include “an examination, analysis and evaluation carried out by . . . the Board”.

39. Section 177V(1) must be construed so as to give effect to Article 6(3) of the Habitats Directive, and hence, an appropriate assessment carried out under the section must meet the requirements of Article 6(3) as set out in the CJEU case law. If an appropriate assessment is to comply with the criteria set out by the CJEU in the cases referred to, then it must, in my judgment, include an examination, analysis, evaluation, findings, conclusions and a final determination.

40. It must be recalled that the appropriate assessment, or a stage two assessment, will only arise where, in the stage one screening process, it has been determined (or it has been implicitly accepted) that the proposed development meets the threshold of being considered likely to have significant effects on a European site. Where that is the position, then, in accordance with the preceding case law, the appropriate assessment to be lawfully conducted in summary:

(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.

(ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.

(iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects.

41. Hence in my judgment the full appropriate assessment required by s.177V(1) must include all of the above elements and not just the determination expressly referred to in the sub-section.

42. In *Sweetman (Case C-258/11)*, the CJEU also gave guidance as to the scope of the expression “adversely affect the integrity of the site”. It is unnecessary to consider this in detail save to note that the Board is legally constrained as to how it should address the issue. The Court at para. 39 of its judgment, stated:

“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.”

43. At para. 56, the Advocate General had stated:

“56. It follows that the constructive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is ‘why was *this particular site* designated and what are its conservation objectives?’ . . .”

Appropriate Assessment and Reasons

44. It is agreed that the Board is under an express obligation pursuant to s. 177V(5) of the PDA to give reasons for the determination made under Article 6(3) of the Habitats Directive as to whether or not the proposed development would adversely affect the integrity of a European site. The dispute relates to the

extent or nature of the reasons which must be given. The applicant and the Department submit that where, as in these appeals, the determination is that the proposed development would not adversely affect the integrity of any European site in view of the conservation objectives of those sites, then the reasons must include complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed development on the European sites in the light of the conservation objectives of the sites. They submit that such reasons are required in order that the Court may, in an application for judicial review, be able to ascertain whether or not an appropriate assessment has been conducted in accordance with the requirements of Article 6(3) of the Habitats Directive, as explained in the case law of the CJEU. They refer by analogy to the purpose of the requirement to state reasons as explained by the CJEU in *Mellor (Case C-75/08)* [2009] ECR I-3799 in relation to an implied duty to give reasons for a negative screening decision under the Environmental Impact Assessment Directive. In that judgment, at paras. 57 to 60, the CJEU stated:-

“57. It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.

58. Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority’s screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.

59. In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15).

60. That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.”

45. They also relied upon the principles stated by Clarke J. in the High Court in *Christian v. Dublin City Council* [2012] IEHC 163, [2012] 2 I.R. 506, in relation to the extent of the obligation to give reasons in Irish law. The underlying rationale and extent of the obligation as explained by Clarke J. appears to me to be similar if not identical to that explained by the CJEU in *Mellor*. In that judgment at p. 540, para. 78, Clarke J. explained it in the following terms:-

“The underlying rationale of cases such as *Meadows v. Minister for Justice* [2010] IESC 3 (in that respect) and *Mulholland v. An Bord Pleanála (No. 2)* [2005] IEHC 306 is that decisions which affect a person’s rights and obligations must be lawfully made. In order to assess whether a relevant decision is lawful, a party considering a challenge, and the court in the event of a challenge being brought, must have access to a sufficient amount of information to enable an assessment as to lawfulness to be made. What that information may be, may vary enormously depending on the facts under consideration or the nature of the decision under challenge. However, the broad and underlying principle is that the court must have access to sufficient information to enable the lawfulness of the relevant measure to be assessed.”

46. I note that similar statements of principle have been repeated by Clarke J in the Supreme Court in judgments with which other members of the Court agreed in relation to the extent or type of reasons which must be given in *Rawson v Minister for Defence* [2012] IESC 26 at para 6.8, and *EMI Records (Ireland) & Ors v Data Protection Commissioner* [2013] IESC 34, [2014] 1 ILRM 225, at paras 6.3-6.5.

47. The Board, supported by Galetch, did not dispute the above principles or their applicability to its

obligation to give reasons for its determination in the appropriate assessment. It referred, however, to the Irish case law, and in particular, that relating to s. 34 of the PDA and the obligation on the Board where it departs from its inspectors' recommendations to state "the main reasons" for the departure. In particular, the Board noted case law establishing not only the position that the reasons need not be discursive but also that they should be read from the perspective of an intelligent person who has participated in the proceedings and should give sufficient information to enable an appeal of the decision while demonstrating that the decision maker adequately turned his/her mind to the matters in issue (*O'Neill v. An Bord Pleanála* [2009] IEHC 202 at paras. 27 to 34). Also Counsel for the Board tied the interpretative approach urged by the respondent to the judgment of Kelly J. in *Mulholland v. An Bord Pleanála (No.2)* [2005] IEHC 306, [2006] 1 IR 453. In particular, he noted the comments of Kelly J. at p. 464, paras. 30 to 32, that while new obligations in respect of when reasons are given were introduced by s. 34 of the PDA, the jurisprudence in respect of the content of reasons given by a planning authority had been left unchanged by the legislature. Counsel submitted this position is indicative of a continuing legal position in Irish law on the content of reasons required to be given by a planning authority and, as such, requires that the same interpretation should be given to the statutory obligations in respect of reasons arising under s. 177V(5) of the PDA.

48. On this issue, I have concluded that the submission made on behalf of the applicant and the Department is correct. First, the essential principle is that the reasons must be such as to enable an interested party assess the lawfulness of the decision and in the event of a challenge being brought, the court must have access to sufficient information to enable an assessment as to lawfulness to be made. On the facts of this judicial review, the challenged decisions are those to grant planning permissions. However, the grounds of challenge include the failure of the Board to carry out a proper or lawful appropriate assessment under Article 6(3) as implemented in Ireland. For the reasons already stated in this judgment, the Board could not make a lawful decision to grant planning permission unless it had reached a lawful determination, in an appropriate assessment lawfully conducted, that the proposed development would not adversely impact on the European sites in question. In accordance with the CJEU decision in *Sweetman*, it is for the national court to determine whether the appropriate assessment (including the determination) was lawfully carried out or reached, and to do so, it appears to me that the reasons given for the Board's determination in an appropriate assessment must include the complete, precise and definitive findings and conclusions relied upon by the Board as the basis for its determination. They must also include the main rationale or reason for which the Board considered those findings and conclusions capable of removing all scientific doubt as to the effects of the proposed development on the European site concerned in the light of the its conservation objectives. In the absence of such reasons, it would not be possible for a court to decide whether the appropriate assessment was lawfully concluded or whether the determination meets the legal test required by the judgments of the CJEU.

49. Secondly, it appears to me that whilst the requirement for an appropriate assessment has been implemented in Ireland by amendment of the Planning Acts and requires to be carried out *inter alia* as part of the planning process, the determination which must be made by the Board as competent authority it is not a "planning decision" in the sense used in the judgments relating to reasons relied upon by the Board. In such a planning decision, the Board is exercising a jurisdiction with a very wide discretion. By contrast, the determination it must make as part of an appropriate assessment is significantly narrower and legally constrained as explained in the CJEU cases cited. It also determines the Board's continuing jurisdiction to grant planning consent, and therefore a decision which goes to its jurisdiction. The application of the principles set out by Clarke J. in *Christian, Rawson and EMI* to the different types of decision results as envisaged therein in a requirement for reasons of a different order in relation to the different types of decision.

50. In reaching that conclusion, I am not deciding that the findings and conclusions always have to be ones made by the Board itself. Where the Board appoints an inspector to prepare a report, and the inspector carries out an appropriate assessment as part of his or her report, it may be that if the Board, on consideration, accepts the relevant findings made and conclusions reached by its Inspector in his or her report, that the production of the report may satisfy some or all of the obligation of the Board to give reasons for its determination. This would depend upon the relevant facts.

51. It is now intended to apply the above principles and consider the lawfulness of the appropriate assessment including the determination conducted by the Board in relation to each of the challenged decisions and the adequacy of the reasons given for its determinations. It is necessary to consider each decision separately.

Phase 1 Decision and Appropriate Assessment

52. The evidence adduced by the Board in relation to its phase 1 decision and the appropriate assessment conducted in that appeal is primarily the Board decision (PL 20.239759), the Board direction relating to that decision and the Inspector's Report and the documents referred to therein. The Board direction states that the submissions on this file and on the file relating to the phase 2 decision were considered at the same Board meeting of 8th August, 2013. I accept that fact.

53. The structure of the Board's decision is that it commences by stating its planning decision; it then identifies the matters considered; it then appears to include a number of paragraphs relating to the environmental impact assessment, it carried out; and then in two paragraphs identifies the appropriate assessment conducted and its reasons for the determination reached therein before returning to its final planning assessment and then sets out the conditions to be attached to the grant of permission. Counsel on behalf of the Board submitted that this was the structure of the decision. The two paragraphs expressly referring to the appropriate assessment are in the following terms:-

"The Board completed an Appropriate Assessment in relation to potential impacts on Natura 2000 sites and having regard to the Natura Impact Statement submitted including mitigation measures proposed and the reports of the Inspector in relation [to] the current file and to file register reference number PL20.241069, the further information submitted to An Bord Pleanála and to other submissions on file the Board concluded that on the basis of the information available that the proposed development either individually or in combination with other plans or projects would not adversely affect the integrity of any European site in view of the conservation objectives of this sites.

The Board did not agree with the Inspector's conclusions set out in section 32.3.6 of her report regarding the adverse effects of the proposed development on feeding/roosting/commuting area and natural flight lines of certain water birds in the light of the comprehensive additional data in this regard submitted as further information to the Board on the 6th day of June 2013. The Board did not agree with the further conclusion of the Inspector in relation to the adverse effects of the proposed development on the integrity of European sites at Lough Croan SAC (Site No. 000610) and Lough Croan SPA (Site No. 004139). The Board considered that it could not reasonably be concluded on the basis of the information on ground conditions and other material submitted; the nature of the proposed development and the use of normal good construction practice, that the integrity of these sites would be adversely affected by the proposed development."

54. Earlier in its decision, the Board had stated in relation to the Inspector's Report:-

"The Board generally adopted the report of the Inspector except in relation to the following items (see section 44E of the Inspector's Report):

- landscape and visual impacts
- hydrology and groundwater quality and flows, and
- bird movements in the area, for the reasons set out below."

55. Section 44E of the Inspector's Report forms part of the environmental impact assessment conducted by the Inspector. It is not expressly part of the appropriate assessment conducted by her. The landscape and visual impacts are of no relevance to the appropriate assessment. Both hydrology and groundwater quality and flow and bird movements in the area are of direct relevance. The reasons included by the Board in its decision in the context of the environmental impact assessment as to why it did not adopt the report of the inspector in relation to these items are explained in the following terms:-

"The Board considered the subject of hydrology and the potential for adverse impact by the proposed development on groundwater quality and flow in this karst area. The Board is satisfied taking into account the information supplied by the applicant including the resistivity test data submitted to the planning authority at further information stage that subject to normal good construction practice turbine foundations can be developed at this location without significant impacts on the hydrology or hydrogeology of the area.

The Board is satisfied on the basis of the survey information submitted to the planning authority

(Chapter 8, EIS) and the further information submitted on 6th day of June 2013 to An Bord Pleanála in relation to bird movements in the area that the proposed development is unlikely to have any significant impacts on avifauna including species of water birds of conservation interest. While the Board reached this view independently of the applicant's proposed use of a radar detection system as an additional mitigant it is of the view that this system may be of valued as an aid to minimising impacts on specific bird species in the area."

56. I accept the submission made on behalf of the Board that those two paragraphs in the decision should not be considered as part of the appropriate assessment conducted by the Board but rather form part of the environmental impact assessment. However, that does not assist the Board in relation to the validity of the appropriate assessment conducted, save that it should not be considered as evidence of the application of an incorrect legal test as was submitted by the applicant.

57. The two paragraphs included by the Board in its decision in relation to the appropriate assessment must be considered in the context of that part of the Inspector's Report, which includes the appropriate assessment conducted by her and her findings and conclusion. It assists in identifying the relevant sites, their conservation objectives and potential impacts of the proposed developments.

58. The Inspector set out the appropriate assessment conducted by her at section 32 of her report. It commences by identifying ten Natura 2000 sites in the area of the proposed development. She then gives a short summary of the five nearest conservation sites, their objectives and the impacts on them in the following terms:-

"32.1.2 The following is a short summary of the five conservation sites nearest the appeal site based on the site synopses.

1. Lough Croan - part turlough / part floating fen; supports multitude of highly diverse vegetation, including Red Data - Northern Yellow Cress; important ornithological site; species using site include Whooper Swan, Golden Plover, Greenland White-Fronted Goose (River Suck population), Shoveler, Bewick Swan, Wigeon, Gadwall, Teal, Mallard, Pintail, Lapwing, Curlew, Blackheaded Gull; wintering water fowl numbers are large and site is especially useful to dabbling duck; important site due to its overall size, birdlife and rare plant communities and the species it supports;
2. Four Roads Turlough - very important site as refuge and feeding area for wildfowl and waders; bird numbers variable; can be very large; extensively used by Greenland White-Fronted Goose (River Suck population); other species include Wigeon, Teal, Shoveler; Bewicks Swan, Golden Plover, Lapwing, Curlew; occasional use by Whooper Swan;
3. River Suck Callows - extensive linear site (70km) that floods each winter; important for Greenland White-Fronted Geese (flock of international importance), Whooper Swan, Golden Plover, Wigeon, Lapwing, Mute Swan, Teal, Pintail, Curlew, Black-headed Gull as well as Otter and Hare. There is a wild fowl sanctuary north of Ballyforan;
4. Lough Funshinagh - classified as turlough; water levels fluctuate significantly; important for wintering waterfowl including Whooper Swan, Bewicks Swan, Golden Plover, Wigeon, Teal, Mallard, Shoveler, Pochard, Tufted Duck, Coot, Lapwing and Curlew and also used by River Suck, Greenland White-Fronted Geese;
5. Lisduff Turlough - important for waders and wintering wildfowl; Bewick Swan, Golden Plover, Dunlin, Pintail, Pochard, Lapwing, Curlew, Snipe.

The conservation objectives for these sites are:

- Lough Croan - (i) maintain Annex I habitat - Turlough; (ii) maintain or restore favourable conservation conditions for Shoveler, Golden Plover and Greenland White-Fronted Geese; (iii) additional conservation interest for Wetlands and Water birds;
- Four Roads - (i) maintain Annex I habitat - Turlough; (ii) maintain or restore favourable

conservation conditions for Golden Plover and Greenland White-Fronted Geese; (iii) additional conservation interest for wetlands and water birds;

- River Suck - (i) maintain special conservation interest for Whooper Swan, Greenland White-Fronted Geese, Wigeon, Lapwing, Wetlands and Water birds;
- Lough Funshinagh - (i) maintain Annex I habitat - Turlough;
- Lisduff Turlough - (i) maintain Annex I habitat - Turlough;

32.2 Direct and Indirect Impacts

32.2.1 I consider the main direct impacts will be from

- Displacement of Golden Plover and Lapwing in the short term due to construction noise and loss of habitat and in the long term due to the sight, noise and vibration of turbines;
- Disturbance of feeding/ roosting/ commuting area and interference with natural flight lines of Whooper Swans, Greenland White-Fronted Geese and Golden Plover;
- Bird strikes due to collision with wind turbines;

32.2.2 I consider the main indirect impact in the short and long term will be from

- Change in turlough habitat."

59. The Inspector then assessed the direct and indirect impacts under each of the above headings as follows:-

"32.3 Assessment

32.3.1 Displacement of Golden Plover and Lapwing within and in the vicinity of the site

32.3.2 Both the notes from the Bird Survey and the NIS state that Golden Plover were regularly observed near the site but not in the immediate area of the proposed development. Some 3,000 were observed in a flock at Lough Croan during the winter surveys and Lapwing were observed during the winter surveys including on wet grassland in the region surrounding Lough Croan. Table 8.5.4.1, (Ornithology Section, EIS) lists both species as being observed in and around the survey area but considered that neither species to be at risk. They are not discussed in the NIS. In view of the extensive, alternative habitat available in the area to this species, I consider that there is unlikely to be a significant long-term impact.

32.3.3 Disturbance of feeding/ roosting/ commuting area and natural flight lines of Whooper Swan, Greenland White-Fronted Geese, Golden Plover and Water birds

32.3.4 The conservation areas in the vicinity of the site support a large population of wintering birds, including Whooper Swan; Greenland White-Fronted Geese, Golden Plover and Water birds. All five are noted as using the River Suck, Four Roads Turlough, Lough Croan and Lough Funshinagh, whilst Lisduff Turlough supports Golden Plover and water birds. Greenland White-Fronted Goose are known to be highly faithful to a site. The Synopses describe them as based on the River Suck, but also note that they regularly utilise Four Roads Turlough, Lough Croan and Lough Funshinagh.

32.3.5 The conservation areas provide a cluster of wetland areas. They are supported by the non-conservation wetland sites in the area, including Thomas Street Turlough, Lough Feacle Loughs Cuilleenirwan and Coolagarry and the Ballyglass Canal, as well as the smaller flooded area adjoining the site. The data submitted refers to the large number of Whooper Swans at Lough Feacle and along the Ballyglass Canal. I am satisfied from my inspection and other appeal submissions that Whooper Swan also use Thomas Street Turlough and the flooded lands east of the site. Together, these wetlands provide an extensive network of feeding and roosting areas for

the Whooper Swan and Greenland White-Fronted Goose.

32.3.6 The surveys do not address the interconnections between the conservation sites and provide no information on the movement of Greenland White-Fronted Geese in the area. The 2007/2008 census indicates that there are still significant numbers on the River Suck, notwithstanding a decline in numbers. Overall, I would be concerned that the level of information provided is lacking in detail, is unduly focussed at Lough Feacle, due to the separate application in this area and does not provide a definitive picture of the flight paths of protected species in the area of the site, as they move between the different wetlands in the area. Furthermore, I do not consider the applicant has provided adequate information to prove beyond reasonable scientific doubt that the wind farm will not impact on the feeding/ roosting/ commuting area and natural flight lines of Whooper Swan, Greenland White-Fronted Geese, Golden Plover and Water birds, and would not have an adverse impact on these protected species and on the integrity of the three conservation sites, River Suck, Lough Croan and Four Roads Turlough, nearest the proposed wind farm.

32.3.7 Bird strikes due to collision with wind turbines

32.3.8 The applicant proposes to install a Merlin Avian Radar System that once trained, will provide constant monitoring of bird movements in the area of the site and eliminate potential bird strike by providing advance warning and allowing necessary turbine shut down. Information submitted (30/01/12) shows that the system is in use at a number of coastal wind farm sites including six in Europe. None of these sites would be similar to the area of the appeal site, which is an inland, moderately undulating site with a network of wetland systems within a relatively small area, that support important populations of wintering birds. They would also not be similar in terms of weather patterns and topography. A report submitted by Appellant I, which reviews use of the radar system at a site in Sweden, also indicates problems of blind spots, echoes and ground clutter that can mask bird activity. DAHG have also expressed concerns as to the efficacy of the system. I consider the information provided to date has not demonstrated that the use of a radar system can effectively mitigate bird strikes at the site.

32.3.9 It is argued that Whooper Swan generally fly at heights well below the minimum rotor sweep of 35m proposed and that the risk of collision is therefore very small. A reduction in turbine height and concomitant reduction in rotor sweep will increase the risk of bird strike. I do not consider the proposed turbine height is acceptable in the mixed hilly, flat farmland, where the development is located and consider, therefore that this argument is not acceptable. Overall, I consider the applicant has not proven beyond reasonable scientific doubt that adverse effects on the integrity of the site with respect to its impact on conservation species in terms of bird strike will not occur.

32.3.10 Changes in turlough habitat

32.3.11 Four of the conservation sites nearest to the appeal site are turloughs. Turloughs are seasonal lakes found in karstified limestone areas where rainfall disappears directly underground through the fissures and conduits in the rock. They fill when the groundwater rises in the autumn and empty as water levels fall in the spring and some are also fed by rivers and streams flowing into them. The water flow rate through karstified rock can be quite rapid and water from a turlough may flow underground to a spring at a rate of 1 00m per hour or more. They have a unique flora and can be important bird haunts, in particular Greenland White-Fronted Geese, Whooper Swan, Widgeon, Teal and many waders. Turloughs are priority Annex I habitat (3180) and the habitat is almost unique to Ireland.

32.3.12 There are a number of turloughs on the lower lands immediately below the site as well as the cluster of conservation sites in the wider area. The nearest turlough conservation site is Lough Croan. It is an extensive, linear wetland about 1.1km from the nearest turbine. The turlough habitat, which underpins the conservation species in the area, and the potential impact of the development on the habitat is not discussed in the NIS.

32.3.13 The site is located on karst limestone and all rainwater falling on the site recharges directly to groundwater through the fissures and conduits in the underlying bedrock. The results of 2-D resistivity testing indicate that further investigations are required to determine the depth to competent rock and inform the design of the base, at ten of the turbine sites. At a number of

sites, excavation may extend below groundwater level. The potential to alter the pattern of recharge within the site as a result of the depth of excavation into the karstic layer or by the proposals to discharge surface water throughout the site is not addressed in the application. It is stated that these matters will be addressed following further investigations necessary to determine the detailed design of the turbine base. Turloughs are a relatively shallow habitat. A small alteration in the pattern of recharge has the potential to have a significant impact on the ecology of the area. Furthermore, given that turloughs generally occur in an area with an extensive groundwater system and where water can flow rapidly over significant distances, I consider that a higher burden of proof is required to demonstrate that the development will not have adverse impacts on Lough Croan the nearest conservation site to the proposed development. I consider that the development raises significant concerns. and it has not been established beyond reasonable scientific doubt that adverse effects on the integrity of Lough Croan will not occur.

32.3.14 On the basis of the Appropriate Assessment, I consider it reasonable to conclude, on the basis of the information available, that the proposed development would adversely affect the integrity of the European sites Lough Croan Turlough SAC, Site No. 000610 and Lough Croan Turlough SPA, Site No. 004139 in view of these sites' conservation objectives."

60. As appears from the above, the appropriate assessment conducted by the Inspector cannot be considered as one which includes complete, precise and definitive findings and conclusions that are capable of removing all scientific doubt as to the effects of the proposed development on at least the five closest European conservation sites concerned. On the contrary, her assessments under the headings of:

- (i) disturbance of feeding/roosting/commuting area and natural flight lines of Whooper Swan, Greenland White Fronted Geese, Golden Plover and water birds;
- (ii) bird strikes due to collision with wind turbines; and
- (iii) changes in turlough, habitat,

either identify *lacunae* in the information provided in the NIS or reach negative conclusions.

61. Subsequent to the Inspector's Report, the Board obtained further information. That information was a wintering bird survey undertaken between January and March 2013. It was furnished in response to a letter seeking further information from the Board dated 7th December 2012. The survey related to Whooper swans and Greenland white-fronted geese. Whilst, in the course of the hearing, there were submissions made by counsel for the Department and the Board for and against the adequacy of the survey as a response to the request dated 7th December, 2012, and in particular, the absence of any survey of Golden Plover, that issue need not be decided as part of the present consideration of the lawfulness or otherwise of the appropriate assessment conducted by the Board.

62. Returning to the evidence before the Court of the appropriate assessment conducted by the Board, taking into account the appropriate assessment conducted by the Inspector, it consists only of the four sentences in the two paragraphs in the Board Decision, together with what is stated by the Inspector in section 32 of her report, insofar as the Board has not disagreed with same. There is uncertainty as to how much of the appropriate assessment conducted by the Inspector or the findings made or conclusions reached by her is accepted by the Board in its decision by reason of the general statement of acceptance save in relation to matters the matters specified but not by reference to the appropriate assessment part of the Inspector's report.

63. In the Board's own appropriate assessment, set out in its Decision, the first sentence is simply the statement of its determination and the identification of the material upon which the determination was based. Of the material identified, the only part which may constitute evidence of an assessment made by or on behalf of the Board, as distinct from information which the Board might have taken into account in making its assessment, is the Inspector's Report.

64. One of the consequences of the absence of any formal screening for an appropriate assessment pursuant to s. 177U as to whether the proposed development is likely to have a significant effect on the European site is that there is no identification, in advance of carrying out the appropriate assessment, of the reasons for which it is has been determined that the proposed developments meet the, admittedly low, threshold of being

likely to have a significant effect on the European sites, having regard to their conservation objectives and require an appropriate assessment. On the facts herein, the Inspector, in her report, identified the potential direct and indirect effects in relation to wintering waterfowl and waders under the headings of 'Displacement', 'Disturbance of Feeding/Roosting/Commuting Areas and Interference with Natural Flight Lines and Bird Strikes', and in addition, a change in turlough habitat, the latter being by reason, principally, of the karst limestone underlying the site of the proposed development, the extensive ground water system and potential to alter the pattern of recharge.

65. In relation to the potential impact on the water fowl and waders by reason of disturbance of feeding/roosting/commuting area and interference with natural flight lines and potential bird strikes, the only evidence of any assessment conducted by the Board itself is its statement in its decision that it "did not agree with the Inspector's conclusions set out in s. 32.3.6 of her report regarding the adverse effects of the proposed development on feeding/roosting/commuting area and natural flight lines of certain water birds in the light of the comprehensive additional data in this regard submitted as further information to the Board on the 6th day of June 2013". There is no evidence of any analysis or evaluation conducted by the Board of the further information or findings made by it.

66. In relation to the effects of potential changes in the turlough habitat identified by the Inspector in paras. 32.3.11 to 32.3.13 of her report, the Board does not, in its Decision, provide any evidence of any further or different assessment conducted by it and simply states it did not agree with the conclusion reached by the Inspector at para. 32.3.14 of her report that the proposed development would adversely affect the integrity of three of the named sites in the light of those sites' conservation objectives and then adds its conclusion "that it could not reasonably be concluded on the basis of the information on ground conditions and other material submitted; the nature of the proposed development and the use of normal good construction practice, that the integrity of these sites would be adversely affected by the proposed development".

Conclusion on Phase 1 Appropriate Assessment

67. My conclusion is that, on the evidence before the Court, the Board has failed to carry out an appropriate assessment which meets the requirements of Article 6(3) of the Habitats Directive, as explained by the CJEU. There is no evidence before the Court of an assessment conducted by the Board (or through its Inspector) which meets the criteria set out at paragraph 40 of this judgment and identifies, in the light of the best scientific knowledge in the field, all aspects of the proposed development which, by itself, or in combination with other plans or projects which affect the European sites and contains complete, precise and definitive findings and conclusions which the Board considers capable of removing all reasonable scientific doubt as to the effects of the proposed development on the integrity of a number of Natura 2000 sites close to the site of the proposed development.

68. For the reasons set out earlier in this judgment, the determination made by the Board that the proposed development, individually or in combination with other plans or projects, would not adversely affect the integrity of any European site in view of the conservation objectives of those sites cannot be considered lawful unless such determination is made as part of an appropriate assessment which is lawfully conducted. Further, in the absence of such a lawful determination, the Board did not have jurisdiction to grant planning permission for the proposed development pursuant to s. 177V(3) of the PDA. It follows that the applicant is entitled to an order of *certiorari* of the Phase 1 decision.

69. I have also concluded on the same evidence that the Board failed to give reasons for its determination in the appropriate assessment which meets the requirements set out earlier in this judgment.

Phase 2 Decision and Appropriate Assessment

70. The evidence adduced by the Board in relation to the Phase 2 Decision is primarily the Board Decision (PL20.241069), the Board Direction relating to that Decision, and the Inspector's Report of Ms. Deirdre MacGabhann, which, whilst dated 6th February, 2012, it is agreed was, in fact, finalised on 6th February, 2013 and the documents referred to therein.

71. The Board Decision follows the same format as that in Phase 1. The Department and applicant laid emphasis upon the fact that, unlike the Decision in relation to Phase 1, there is no reference to the additional information by way of bird survey furnished to the Board on 6th June, 2013, either in the list of matters to which the Board had regard or in those paragraphs of the Decision which appear to constitute the appropriate assessment. I will return to this.

72. In relation to the appropriate assessment, the Board stated, in its Decision:

"The Board completed an Appropriate Assessment in relation to potential impacts on Natura 2000 sites and, having regard to the Natura Impact Statement submitted, including mitigation measures proposed and the reports of the Inspector in relation [to] the current file and to file register reference number PL20.239759, the further information submitted to the planning authority on the 8th day of June, 2012 and to other submissions on file, the Board concluded, on the basis of the information available, that the proposed development, either individually, or in combination with other plans or projects, would not adversely affect the integrity of any European site in view of the conservation objectives of those sites.

The Board did not agree with the Inspector's conclusions, as set out in section 11 of her report, regarding the adverse effects of the proposed development on bird species utilising the site in the light of the comprehensive data in this regard submitted with the application as referenced above. With regard to impacts on karst limestone bedrock the Board considered that it could not reasonably be concluded, on the basis of the information on ground conditions and other material submitted, the nature of the proposed development and the use of normal good construction practice, that the integrity of these sites would be adversely affected by the proposed development. Finally, with regard to the impact of the proposed development on bats, the Board noted the substantial survey work completed prior to the application as well as the further information submitted to the planning authority on the 8th day of June, 2012 and considered that, subject to the implementation of the proposed mitigation measures, the residual impacts of the proposed development on bats would be minimal."

73. Firstly, insofar as relevant to dispose of the question as to whether the Board indicated that it did have regard to the bird survey furnished in relation to the Phase 1 appeal in June 2013, it appears to me that whilst there is no reference to this in the first paragraph above, it may be that it is being referred to in the first sentence of the second paragraph. The further information was provided to the Board in connection with the Appeal Reference No. PL. 20.239759, and this appeal appears to be referred to in the first sentence of the second paragraph as "the application as referenced above". I am accepting, for the purposes of this judgment, that the Board did have regard to that additional data.

74. Similar to Phase 1, there is no formal screening determination. However, also similarly, the Inspector (who was a different Inspector to that appointed in respect of the Phase 1 appeal) conducted an appropriate assessment from paras. 10.124 to 10.163 of her report. The Inspector states at para. 10.128 that she followed the Department of Environment's guidance document on appropriate assessment and the European Commission's advice on appropriate assessment. She also refers to the earlier part of her report which, she states, sets out much of the information required for the appropriate assessment and then summarises the key aspects of the development as it relates to the appropriate assessment. The Inspector considers in some detail the short and long-term, indirect and cumulative impacts which are likely to arise from the construction and operational phases of the development from paras. 10.136 to 10.153. She then considers certain mitigation issues. It is unnecessary to set these out in full. She identifies the residual impacts and states her appropriate assessment conclusion at paras. 10.160 to 10.163 in the following terms:

"10.160 Based on my assessment above, I consider that two key residual impacts remain. Firstly, in the absence of:

- a. Detailed geo-technical investigations regarding the construction of the proposed turbine bases and sub-station in areas of karstified limestone and
- b. Detailed design solutions for the site specific disposal of surface water arising on site,

10.161 There is a risk that the construction of the wind farm will impact on groundwater flow paths within the karst landscape which may in turn affect the hydrology/hydrogeology of the network of designated wetland systems (notably turloughs) in the vicinity of the site and their associated habitats and species.

10.162 Secondly, in the absence of detailed survey information on the use of the appeal site by bird species listed of Conservation Interest in the surrounding network of SPA's there is a risk that the proposed development will adversely impact on these species by virtue of disturbance, barrier

effects to movement and collision risk arising from the construction and operation of the wind farm. These impacts could disrupt factors which maintain the favourable conditions for the species in the wider environment and in the network of SPAs in particular.

10.163 In view of the above, I consider that it is not reasonable to conclude on the basis of the information available that the proposed development would not individually, and in combination with other projects, adversely affect the integrity of the European sites in the vicinity of the appeal site (Lough Croan Turlough SPA, site code 004139; Four Roads Turlough SPA, site code 004140; River Suck Callows SPA, site code 004097) in view of the site's conservation objectives."

75. The Inspector, finally, in s. 11 of her report, sets out her overall summary and conclusions which, obviously, go beyond the appropriate assessment. Paras. 11.1 to 11.3 and 11.6 relate to the appropriate assessment:

"11 SUMMARY AND CONCLUSION

11.1 International and national policies actively support and encourage the growth of renewable energy sources and wind energy development in particular. However, the government's guidelines on wind energy development state that the implementation of renewable energy policies must have regard for the environment, specifically the legally binding requirements of the EU Directives on Birds and Habitats.

11.2 The appeal site lies within 15km of 14 statutorily designated European sites as part of the European Natura 2000 network and the site itself hosts bird species of national importance and bird species which are listed of Special Conservation Interest in the 3 no. Special Protection Areas in the vicinity of the site. On the basis of the information provided by the applicant, I am not satisfied that the applicant has demonstrated that the proposed development will not adversely impact on bird species utilising the site, by way of disturbance, barrier effects to movement and collision risk arising from the construction and operation of the

wind farm. In particular, these impacts could disrupt factors which maintain the favourable conditions for the species in the wider environment and in the network of SPA's in particular.

11.3 The appeal site is underlain by karstified limestone bedrock and within the same groundwater bodies as the network of designated wetland habitats within 15km of the site. I do not consider that the applicant has adequately demonstrated that the proposed development will not adversely impact on groundwater flowpaths within the karst landscape or indirectly therefore the groundwater regime of the designated wetland habitats in the vicinity of the site.

. . .

11.6 In summary, I consider that the proposed development should be refused for the two above substantive reasons set out above, impact on

hydrology/hydrogeology of related designated wetland systems and impact on bird species of Special Conservation Interest occurring on the site and in the surrounding network of Special Protection Areas."

76. The Board, in the Phase 2 Decision, also expressly stated that it:

". . . generally adopted the report of the Inspector except in relation to the following items (see section 11):-

(1) hydrology and groundwater quality and flow, and

(2) bird movements in the area,

for the reasons set out below."

77. For the reasons already set out, whilst the Board is entitled to rely upon an appropriate assessment conducted by its Inspector, and whilst it has generally adopted the Inspector's Report, the findings made and

conclusions reached by the Inspector in relation to the matters identified as potentially affecting the integrity of the Natura 2000 sites concerned, are such that the appropriate assessment in the Inspector's Report could not support a determination that the proposed development would not adversely affect the European sites concerned, having regard to their conservation objectives when considered by the Court in accordance with established judicial review principles.

78. Again, the first paragraph of the Board's Decision relating to the appropriate assessment is no more than its determination or conclusion that the proposed development, either individually or in combination with other plans or projects, would not adversely affect the integrity of any European site in view of the conservation objectives.

79. In the first sentence of the second paragraph, the Board again simply disagrees with the Inspector's conclusions regarding the adverse effects of the proposed development on the bird species using the conservation sites. There is no evidence of any assessment conducted by the Board which includes complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed development on the Natura 2000 sites concerned, having regard to their conservation objective of supporting the wintering wild fowl and waders identified.

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

Conclusion on Phase 2 Decision

81. My conclusion is that on the evidence before the Court the Board has not lawfully conducted an appropriate assessment in accordance with Article 6(3) of the Habitat Directive capable of supporting its determination. It follows, for the reasons already set out, that by reason of its failure to do so, it did not have jurisdiction to grant permission for the proposed development and the applicant is entitled to an order of *certiorari* of the Phase 2 Decision.

82. I have also concluded that it failed to give reasons for its determination in the appropriate assessment in the Phase 2 Decision in accordance with the principles set out in this judgment.

Other Issues

83. By reason of the conclusions reached on the principal issues in dispute, it is unnecessary to consider the further issues raised by the applicant.

Relief

84. There will be orders of *certiorari* of each of the decisions of the Board set out in paragraph 1 of this judgment.

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]

* Language of the case: English.

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 19 April 2018(1)

Case C-164/17

**Edel Grace
Peter Sweetman**
v
An Bord Pleanála
joined parties:
**ESB Wind Development Limited,
Coillte,
The Department of Arts, Heritage and the Gaeltacht**

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Reference for a preliminary ruling — Environment — Directive 92/43/EEC — Article 6(3) — Directive 2009/147/EC — Assessment of the implications of a wind farm project for a special protection area — Hen harrier (*Circus cyaneus*) — Mitigation measures)

I. Introduction

1. The hen harrier (*Circus cyaneus*) is an iconic bird which is famous, among other things, for its so-called 'skydancing', by which it engages in aerial acrobatics by twisting, turning and somersaulting in the sky as a means of attracting a mate. (2)
2. ESB Wind Development Limited and Coillte seek to build a wind farm at Keeper Hill, County Tipperary, within an area specially designated to protect the hen harrier under Directive 2009/147/EC ('the Birds Directive'). (3)
3. The Irish authority An Bord Pleanála has granted permission for them to do so, partly because it takes the view that measures proposed by the developers in a Species and Habitat Management Plan comply with the obligations contained in Article 6(3) of Directive 92/43/EEC ('the Habitats Directive') (4) which requires An Bord Pleanála as the competent national authority to have ascertained that the wind farm development will not adversely affect the integrity of the area designated for the hen harrier.
4. Edel Grace and Peter Sweetman ('the applicants') disagree with this. They take the view that, in all of the relevant circumstances, the requirements of Article 6(3) of the Habitats Directive have not been made out. They have instituted proceedings before the Irish courts challenging the permission granted by An Bord Pleanála. This dispute has made

its way to the Supreme Court of Ireland which has submitted a reference for a preliminary ruling to resolve the dispute.

5. This Court has already had the occasion to consider the scope of Article 6(3) of the Habitats Directive. The facts arising in the main proceedings are different from those considered in previous judgments, due to the peculiarities of the habitat of the hen harrier and the way it is cared for via human intervention.

6. Nor is this case the first to come before the Court involving a clash between the promotion of wind power and the protection of birds, both of which constitute laudable measures contributing to environmental conservation. (5) Given the need to reconcile the Member States' increasing use of renewable energy sources, such as wind power, and the protections afforded to habitats and species, such as the hen harrier, under the Birds and Habitats Directives, this case presents the Court with a timely and valuable opportunity to develop its case-law on Article 6 of the Habitats Directive.

II. Legal framework

A. *The Birds Directive*

7. Article 4(1) of the Birds Directive provides that the Member States are to designate the most suitable territories for the protection of birds listed in Annex I to that directive as special protection areas ('SPAs') as follows:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

...

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

8. The first sentence of Article 4(4) of the Birds Directive sets forth the requirements for the protection of SPAs:

'In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article.'

B. *The Habitats Directive*

9. The Habitats Directive provides for the establishment of sites of Community importance ('SCIs') which are intended to secure the conservation of particular types of habitats and individual species of animals and plants. The SCIs under the Habitats Directive together with the SPAs under the Birds Directive comprise the Natura 2000 network.

10. Within the section titled 'Conservation of natural habitats and habitats of species', Article 6(3) of the Habitats Directive provides:

'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.'

11. Article 7 of the Habitats Directive applies the foregoing provisions to SPAs under the Birds Directive as follows:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of [the Birds Directive] in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under [the Birds Directive], where the latter date is later.'

III. The facts in the main proceedings and the question referred for a preliminary ruling

12. The hen harrier (*Circus cyaneus*) is a medium-sized bird of prey with an owl-shaped face which can generally be found in many parts of Europe and Asia. (6) It is a bird species of international conservation concern, (7) and is listed in Annex I to the Birds Directive. (8) Under Article 4(1) of the Birds Directive, bird species listed in Annex I to that directive are subject to special conservation measures concerning their habitat in order to ensure their survival and reproduction,(9) and Member States are obliged to designate the most suitable territories as SPAs for the conservation of these species.

13. In 2007, Ireland designated the Slieve Felim to Silvermines Mountains Special Protection Area ('the SPA') (10) which comprises an area of a little over 20 900 hectares located in Counties Tipperary and Limerick. (11) The conservation objective of the SPA is to maintain or restore the favourable conservation condition of the hen harrier. (12) The SPA is considered to be 'one of the strongholds' for the hen harrier in Ireland, and is rated among the top 5 most important sites in Ireland for the species. (13) Ireland's designation of the SPA was prompted by infringement proceedings brought against it by the Commission, whereby in its judgment of 13 December 2007, the Court declared that Ireland had failed to fulfil its obligations under the Birds Directive by, inter alia, failing to designate sufficient SPAs for several bird species including the hen harrier. (14)

14. In the main proceedings, the applicants challenge the grant of planning permission taken by the Irish authority An Bord Pleanála ('the Board') for the development of a wind farm comprising 16 wind turbines and related infrastructure ('the wind farm') that lies fully within the SPA. (15) The wind farm covers an area of 832 hectares of land owned by Coillte, a State-owned company engaged in commercial forestry, which together with ESB Wind Development, a State body in the energy sector (together, 'the developers') are the joint developers of the wind farm and named as notice parties in the proceedings.

15. The Department of Arts, Heritage and the Gaeltacht ('the DAHG') is the department of the Irish Government responsible for the National Parks and Wildlife Service ('the NPWS') charged with the protection of habitats and certain bird species and is also named as a notice party in the main proceedings. It took part in the planning process involving the wind farm.

16. According to the information before the Court, in 2013, the developers submitted a planning application for the development of the wind farm to the North Tipperary County Council ('the County Council'). The County Council refused planning permission on the grounds that the wind farm, which would result in significant loss of foraging habitat for the hen harrier, would have a seriously detrimental impact on the conservation status of the SPA.

17. The developers appealed the County Council's decision to the Board. This was followed by several exchanges between the developers and the DAHG and the issuance of a report of the Board's inspector.

18. On 22 July 2014, the Board granted planning permission to the developers for the wind farm. In carrying out what is viewed as an appropriate assessment within the meaning of Article 6(3) of the Habitats Directive, the Board concluded that, subject to the identified mitigatory measures in the developers' proposal, including the implementation of the Species and Habitat Management Plan ('the SHMP'), the wind farm would not adversely affect the integrity of the SPA.

19. The applicants appealed the Board's decision to the High Court which dismissed the challenge on a number of grounds. The applicants then obtained leave to bring an appeal to the Supreme Court of Ireland which decided to refer a question to the Court.

20. The referring court considers that the difficulty of interpretation arising in this case stems from the fact that part of the habitat which is beneficial to the hen harrier, and thus which is essential to the maintenance of the integrity of the SPA, is not static and changes over time, so that the hen harrier populates different parts of the site at different times which will partly depend on how the site is managed by human intervention.

21. In order to provide context to the factual background of this case, annexed to the order for reference is a schedule containing a statement of facts that the referring court is satisfied have been established ('the schedule'). The schedule provides information concerning, inter alia, the habitat of the hen harrier, potential impacts of the wind farm on the hen harrier and the measures set out in the SHMP to address these impacts. Since these issues lie at the heart of this case, I find it useful to set out pertinent information on these aspects.

22. As regards the habitat of the hen harrier, the schedule states that hen harriers are primarily birds that live in open countryside and require extensive areas of suitable land over which to forage. Unplanted bog and heath were traditionally recognised as prime hen harrier habitat, but as commercial forestry became widespread, foraging of young forest plantations became more prevalent. The preferred habitats for hen harrier foraging are bog and heath, hill farmland, new forestry plantations where the trees are under 2 metres high and later stages of second rotation pre-thicket plantations. Hen harriers avoid intensive farmland, mature forest plantations and recently cleared forest plantations. Thus, a forest which is not thinned or harvested, but simply left to mature resulting in a closed canopy, (16) will not be a suitable foraging area for the hen harrier.

23. According to the schedule, the hen harrier population of the SPA will depend increasingly on the presence of unplanted bog and heath and pre-thicket second rotation forest. It seems that the area of bog and heath will remain fairly constant, but the extent of the pre-thicket second rotation forest will vary. Consequently, the physical footprint of the hen harriers' foraging area within the SPA is dynamic rather than static in nature as it constantly changes through active forest management which is currently undertaken. A failure to actively manage the forest plantations would in itself lead to the loss of foraging habitat.

24. The schedule identifies four potential impacts on hen harriers arising from the wind farm. First, there will be *permanent direct loss of habitat*, put at 9 hectares, which represents just over 1 % of the total site area. This loss includes:

- About 1 hectare of cutover bog and wet grassland which are currently suitable foraging habitat would be lost to 1 turbine and its associated access track;
- A further 2 hectares of cutover bog would be lost to a repository area for the wind farm (in the form of a berm for excavated stone material unsuitable for use in construction), but this 'would be expected to recover to some extent in the medium to long term'; and
- The remaining area of about 6 hectares of mostly mature conifer forest is not presently of value to hen harriers, but would be if or when replanted.

25. Second, it is assumed that the *displacement effect* of hen harriers within 250 metres of wind turbines will result in a loss of 162.7 hectares of foraging habitat during the lifetime of the project.

26. Third, *construction activity* of the wind farm is expected to discourage foraging.

27. Fourth, the *collision risk* of the hen harriers with the turbines is deemed to be low based on available studies.

28. The schedule outlines the measures proposed by the SHMP to alter the management regime presently in place and address the potential impacts of the wind farm on hen harriers. (17) First, the SHMP would restore 3 currently planted areas to blanket bog prior to the construction of the wind farm, involving a total of 41.2 hectares, of which 14.2 hectares of this total is located within 250 metres of a turbine.

29. Second, over the lifetime of the project, the SHMP would subject 137.3 hectares of second rotation forest to 'sensitive' management. This 'sensitive' management foresees felling and replacing of the current closed canopy forest so as to ensure that there would be 137.3 hectares of perpetually open canopy forest as foraging habitat, with a view to providing continuous foraging habitat and an ecological corridor between two areas of open bog. This would be done on a phased basis starting a year prior to construction.

30. Third, construction works would generally be confined to times outside the main breeding season.

31. Consequently, the referring court indicates that, as it appears from the schedule, a significant proportion of the SPA involves commercial forestry which only provides suitable habitat for the hen harrier during a portion of the life cycle of the conifer trees. If all trees were allowed, in the absence of commercial forestry management, to grow to maturity, rather than being felled and replaced by new plantations, the habitat in the afforested parts of the SPA would cease to be beneficial for the hen harrier. Thus, the essential purpose for which the SPA was designated is contended to be fulfilled by the fact that the forest is in constant dynamic fluctuation as a result of commercial forestry activity, so that the parts which are at any particular time suitable as habitat for the hen harrier are in constant flux.

32. Following from this, the referring court considers that the habitat which will be lost due to the wind farm would not necessarily form part of the suitable habitat at any particular time, but would only form part of the habitat which might be suitable depending on the pattern of management of commercial forestry that is adopted. Yet, the referring court says that it is arguable that the permanent loss for the duration of the project of a significant area of potential habitat means that the essential integrity of the site designated as an SPA is compromised even though the overall management of the site will be conducted in a way that is designed to maintain, if not improve, its suitability as habitat for the hen harrier.

33. On this basis, the referring court states that it is satisfied on the facts that the SHMP would, at a minimum, maintain and is likely to enhance the amount of suitable habitat available. However, it does not consider it to be clear, as a matter of the proper interpretation of Article 6 of the Habitats Directive, given the dynamic nature of the site, whether it is permissible under EU law to characterise the SHMP as mitigatory under the Court's case-law, as argued by the Board, rather than compensatory, as argued by the applicants, the former being reflected in Article 6(3) of the Habitats Directive and the latter in Article 6(4) of that directive.

34. It is in those circumstances that the Supreme Court of Ireland referred the following question to the Court:

'Where

- (a) a protected site has as its essential purpose the provision of habitat for a specified species

- (b) the nature of the habitat which is beneficial for that species means that the part of the site which is beneficial will necessarily alter over time, and
- (c) as part of a proposed development a management plan for the site as a whole (including changes to the management of parts of the site not directly affected by the development itself) is to be put in place which is designed to ensure that, at any given time, the amount of the site suitable as habitat as aforesaid is not reduced and indeed may be enhanced; but
- (d) some of the site will, for the lifetime of the development project, be excluded from having the potential to provide appropriate habitat,

can such measures as are described in (c) properly be regarded as mitigatory?’

35. Written observations were submitted to the Court by the applicants, the developers, the Board, the Netherlands Government and the Commission. All of them participated in the hearing which took place on 1 February 2018.

IV. Observations of the parties

36. The applicants and the Commission contend that the measures proposed in the SHMP are insufficient to amount to protective (mitigatory) (18) measures within the meaning of the Court’s case-law interpreting Article 6(3) of the Habitats Directive because they do not avoid or reduce the adverse effects on the integrity of the SPA that will arise from the wind farm. The argument is made by reference to the Court’s judgments in, inter alia, *Sweetman*, (19) *Briels*, (20) *Orleans* (21) and *Commission v Germany* (*‘Moorburg plant’*). (22) The applicants and the Commission emphasise in particular that the dynamic nature of the habitat and how it is managed is not decisive since there are parts of the habitat (the areas of bog and heath) that are not dynamic at all, and the SPA must be viewed broadly taking account of all of the activities of the hen harrier across the whole of the protected area.

37. The representative of the applicants stressed, among other things, at the hearing that the SPA must be viewed as all of the areas that have the potential to provide suitable habitat and not just as an area comprised of ‘individual bits’ constituting hen harrier habitat at any particular time. Therefore, it is not possible to construct and operate the wind turbines without reducing the area that has the potential to provide suitable habitat for the hen harrier over the lifetime of the project and hence there will be significant loss of suitable habitat for the hen harrier which constitutes a direct adverse effect on the integrity of the SPA which is not avoided or minimised by the measures proposed in the SHMP.

38. The representative of the Commission further contended at the hearing that an approach based on ‘no net loss’ of existing habitat and thus not taking account of areas that have the potential for foraging habitat would result in affording less protection for designated species than for designated habitat types which is not supported by the Habitats Directive.

39. Moreover, the Commission asserts that the two main obligations imposed by Article 6(3) of the Habitats Directive, as interpreted in the Court’s case-law, for the measures proposed in the SHMP have not been fulfilled. First, there is no measure in the SHMP that mitigates the negative impact resulting from the direct permanent loss of 1 hectare of cutover bog and wet grassland and the direct temporary loss of an additional 2 hectares of cutover bog; the measure in the SHMP to restore the blanket bog and wet heath areas may compensate for that loss in other parts of the SPA, but does not reduce or avoid it. Likewise, as regards the direct permanent loss of 6 hectares of mature forest and the unavailability of an additional 162.7 hectares of foraging habitat due to the displacement effect of the turbines, the measure in the SHMP concerning ‘sensitive’ management of other forest areas does not address this loss of potentially suitable foraging habitat, but rather seeks to compensate for those effects. Second, the measures in the

SHMP could not be predicted with the requisite certainty at the time that the authorities authorised the project in line with the Court's case-law.

40. The Netherlands Government, the Board and the developers submit that Article 6(3) of the Habitats Directive has been complied with. This is so because the measures proposed in the SHMP are sufficient to amount to protective (mitigatory) measures that avoid or reduce the adverse effects on the integrity of the SPA. They submit that the Court's judgments in *Sweetman, Briels, Orleans* and *Commission v Germany ('Moorburg plant')* are distinguishable from the present case and stress that the main proceedings concern the protection of a species, not a habitat type, and thus the conservation objectives and constitutive characteristics of the SPA in relation to the species must be taken into account. They also dispute the Commission's assertion that the measures proposed in the SHMP lacked the requisite certainty at the time that the Board authorised those measures.

41. In particular, the Netherlands Government contends that the test for adverse effects on the integrity of the site under Article 6(3) of the Habitats Directive is different when it comes to the habitat for a (bird) species as opposed to a natural habitat type since it involves taking into account the objectives of the SPA for the species. In that regard, it asserts that a distinction should also be made as between potentially suitable habitat and habitat actually used, with the result that the loss of a part of the habitat that is not in use does not in itself constitute an adverse effect that is deemed to be significant in light of the dynamic nature of the site, the mobile characteristics of the hen harrier and that the area actually used as habitat by the hen harrier will not be reduced.

42. The Board argues, inter alia, that it was required to consider whether the proposed development would adversely affect the enduring essential character of the SPA, namely whether it would reduce the protection offered by the SPA for the hen harrier and in particular its suitability as a foraging habitat. In this context, the loss of some unsuitable and some suitable habitat on one part of the site does not in itself necessarily constitute an adverse effect because the habitat is always in a dynamic state of flux. Consequently, the loss of some part of the habitat on part of the SPA must be considered in the context of the proposed development as a whole which includes active management of the proposed mitigatory habitat as part of the SHMP.

43. In the Board's view, and contrary to the case made by the applicants, that active management does not compensate after the event for adverse effects. Rather, it ensures that by virtue of the commercial management of the forestry throughout the lifetime of the permission, the amount of suitable habitat for the hen harrier is maintained, if not enhanced. Thus, the measures proposed in the SHMP, which the Board underlines are an integral part of the proposed development, are aimed at avoiding any adverse effects for the hen harrier from the wind farm by ensuring no net loss and in fact providing for a net increase of hen harrier foraging habitat. In particular, the representative of the Board emphasised at the hearing that there is no permanent loss in this case because the habitats have no intrinsic value in themselves and the management of the forests assures a continual habitat, as is also the case for the area of bog and heath, and that 'no net loss' was merely the factual finding of the Board in the particular circumstances of the proceedings.

44. The developers assert, among other things, that the loss, stemming from the permanent direct loss of 9 hectares of habitat and the unavailability of 162.7 hectares of foraging habitat arising from the displacement effect, must be seen in context. It does not mean that there will not be suitable areas for foraging and nesting by hen harriers elsewhere on the SPA, and the measures proposed in the SHMP ensure that there will always be an area available for foraging and nesting by hen harriers that is at least the same size as the area currently available. The representative of the developer also stressed at the hearing that the measures proposed in the SHMP are 'light years away' from lacking in certainty within the meaning of this as reflected in the Court's case-law and, in any event, the issue of uncertainty is a question of fact that is not for this Court to assess.

V. Analysis

45. By its question, the referring court in essence asks whether in circumstances involving a site designated for the protection and conservation of a species, part of which is altered over time by human intervention to cater for the species' needs, Article 6(3) of the Habitats Directive must be interpreted as meaning that a project which excludes, during the lifetime of that project, some of the protected area from being suitable habitat for a species for which the site is currently designated, but which is accompanied by a plan which is designed to ensure that the overall amount of suitable habitat for the species is not reduced and may even be enhanced, adversely affects the integrity of the site.

46. The referring court's question is thus concerned in substance with the assessment of the measures proposed in the SHMP concerning the loss of hen harrier habitat stemming from the permanent direct loss of 9 hectares of habitat and the unavailability of 162.7 hectares of habitat due to the displacement effect of the turbines. (23)

47. I take the view that the whole of a site that is designated as an SPA for the benefit of a given species must be taken into account when determining whether a competent national authority has complied with its obligations under Article 6(3) of the Habitats Directive. It is not in conformity with the case-law of the Court interpreting that provision to exclude areas that have not yet been called in aid to provide habitat (potential areas) when assessing whether what is proposed by way of mitigation of the adverse effects of the proposed development is sufficient. This means, in the context of the main proceedings, that what is proposed in the SHMP does not meet the requirement of sufficient protective (mitigatory) measures under Article 6(3) of the Habitats Directive.

48. My analysis is divided into three parts. First, I will provide some preliminary observations on certain obligations imposed on competent national authorities under Article 6(3) of the Habitats Directive as interpreted in the Court's case-law which are relevant to this case. Second, I will discuss pertinent rulings of the Court on the scope of Article 6(3) of the Habitats Directive. Third, I will assess their application to the circumstances of these proceedings.

A. Preliminary observations

49. As regards sites classified as SPAs, Article 7 of the Habitats Directive provides that the obligations arising under the first sentence of Article 4(4) of the Birds Directive are replaced by the obligations arising under Article 6(2) to (4) of the Habitats Directive as from the date of implementation of the Habitats Directive or the date of classification under the Birds Directive, where the latter date is later. (24) This means that plans or projects affecting sites classified as SPAs under the Birds Directive, as in the case of the wind farm in these proceedings, are subject to the requirements of, *inter alia*, Article 6(3) of the Habitats Directive.

50. In summary, Article 6 of the Habitats Directive provides as follows. Article 6(1) of the Habitats Directive aims to ensure that positive steps are taken on a regular basis so that the conservation status of the site in question is maintained and/or restored, whereas Article 6(2) to (4) of that directive serves a different purpose, that of aiming to pre-empt damage being done to the site, or in exceptional cases where damage has to be tolerated, to minimise that damage. Article 6(2) imposes an overarching obligation on the competent authorities of the Member States to avoid deterioration or disturbance. Article 6(3) and (4) applies where there is a plan or project not directly connected with or necessary to site management. (25)

51. The Court has ruled that 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 that directive. Thus, Article 6(2) and Article 6(3) of the Habitats Directive are designed to ensure the same level of protection of natural habitats and habitats of species, while Article 6(4) of that directive constitutes a provision derogating from the second sentence of Article 6(3), (26) thereby allowing the competent national authority to authorise a plan or project despite a negative assessment under Article 6(3) in certain circumstances.

52. Article 6(3) of the Habitats Directive provides for an assessment procedure to be carried out by the competent national authorities which is 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. That provision thus prescribes two stages. The first stage, which is envisaged in the first sentence of Article 6(3) of the Habitats Directive, requires the competent national authorities to carry out an appropriate assessment of the implications for the 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. (27)

53. Relevant to this case, the second stage, which is envisaged by the second sentence of Article 6(3) of the Habitats Directive and occurs following the abovementioned appropriate assessment, allows such a plan or project to be authorised by the competent national authorities only on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4) of that directive (see points 57 and 58 of this Opinion). (28)

54. Accordingly, the Court has ruled that, pursuant to the second sentence of Article 6(3) of the Habitats Directive, the competent national authorities may grant authorisation of a plan or project only if they have *made certain* that it will not adversely affect the integrity of the protected site which is the case when there is no reasonable doubt from a scientific point of view as to the absence of such effects. (29) The Court has additionally clarified that it is at the date of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question. (30)

55. Conversely, it is settled case-law that the competent national authorities must refuse to authorise the plan or project where uncertainty remains as to the absence of adverse effects on the integrity of the site. The Court has reasoned that the authorisation criterion set 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, the Court has emphasised, could not ensure as effectively the fulfilment of the objective of site protection intended under that provision. (31)

56. The application of the precautionary principle in the context of implementation of Article 6(3) of the Habitats Directive therefore requires the competent national authorities to assess the implications of the project for the site concerned in view of *the site's conservation objectives* and, moreover, taking into account *'the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects on the site, in order to ensure that it does not adversely affect the integrity of the site'*. (32) The measures just described denote in substance what are routinely referred to as mitigatory measures which is the term used by the referring court in the order for reference. (33)

57. The Court has so far preferred not to employ the term 'mitigatory measures' to denote the obligations set down in Article 6(3) of the Habitats Directive on the grounds that 'the wording of Article 6 of the Habitats Directive contains no reference to any concept of "mitigating measure"'. (34) Moreover, the Court has emphasised that the effectiveness of the protective measures provided for in Article 6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures — which are in reality compensatory measures — in order to circumvent the specific procedures provided for in Article 6(3) and authorise projects which adversely affect the integrity of the site concerned. (35)

58. Therefore, following from the obligations imposed on competent national authorities by Article 6 of the Habitats Directive as interpreted in the Court's case-law, there is a distinction drawn between the protective measures forming part of a plan or project that avoid or reduce any direct adverse effects on the integrity of a site which may be authorised under Article 6(3) of the Habitats Directive, on the one hand, and compensatory measures that compensate for or offset the adverse effects of the plan or project on the

integrity of a site within a wider framework which may be authorised under Article 6(4) of that directive, on the other. (36) This sets the backdrop for the Court's pertinent rulings on the scope of Article 6(3) of the Habitats Directive.

B. Pertinent rulings on Article 6(3) of the Habitats Directive

59. As mentioned above, the Court has already had the occasion to consider the scope of Article 6(3) of the Habitats Directive and in particular in its rulings in *Sweetman*, *Briels*, *Orleans* and *Commission v Germany ('Moorburg plant')*. Since those rulings feature in the parties' arguments before the Court, I will set out the Court's reasoning in some detail.

60. The request for a preliminary ruling from the Supreme Court of Ireland in *Sweetman* concerned the assessment of certain measures proposed as part of a road development project that involved the permanent and irreparable loss of a part of a designated site's limestone pavement, a priority natural habitat type specially protected by the Habitats Directive. (37) In its judgment, the Court held 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 '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. (38)

61. On that basis, the Court found that the site concerned 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. (39) The conservation objective of the site thus corresponds to maintenance at a favourable conservation status of that site's constitutive characteristics, namely the presence of limestone pavement. (40) The Court concluded that if, after an appropriate assessment, the competent national authority concludes that the plan or project will lead to the lasting and irreparable loss of the whole or part of a priority habitat type whose conservation is the objective that justified the designation of the site concerned, the view should be taken that such a plan or project will adversely affect the integrity of the site and cannot be authorised on the basis of Article 6(3) of the Habitats Directive. (41)

62. *Briels* concerned the assessment of certain measures included in a proposed road-widening project in the Netherlands which affected a site designated under the Habitats Directive to protect the natural habitat type molinia meadows, the conservation objective of which consisted in the expansion of the area of that habitat type and the improvement in the quality thereof. (42) The measures in question aimed to ensure the creation of an area of that habitat type of equal or greater size elsewhere on the same site in order to replace or augment those affected. (43)

63. In its judgment, the Court held that the proposed measures were not aimed at avoiding or reducing the significant adverse effects for that habitat type, but rather tended to compensate after the fact for those effects and thus did not guarantee that the project would not adversely affect the integrity of the site. (44) Moreover, the Court noted that 'as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future'. (45) Accordingly, the Court held that the proposed measures cannot be taken into account at the procedural stage provided for in Article 6(3) of the Habitats Directive. (46)

64. Of note, in her Opinion in *Briels*, Advocate General Sharpston rejected the argument put forward by the Netherlands and United Kingdom Governments that the integrity of the site must be considered as a whole in terms of 'net loss or benefit', meaning that it does not matter that a particular habitat is lost in one part of the site, provided that at least an equivalent (and preferably a greater) area and quality of the same habitat is created elsewhere within the site. (47) While the Advocate General agreed that the integrity of the site should be viewed as a whole, she stressed that in all cases, Article 6(3) of the Habitats

Directive requires consideration of the site's conservation objectives, and even if a net beneficial effect is predicted, there is still an adverse — possibly even irreparable — effect on the existing natural habitat and thus on the integrity of the site. (48)

65. In *Orleans*, the Court was confronted with the assessment of proposed measures, included as part of a port development project, which provided for the creation of an area of natural habitat type that would be put in place before any possible adverse effects on the existing habitat type occurred, but which would be completed subsequently to the assessment of the significance of any adverse effects on the integrity of the site. (49)

66. In its judgment, the Court found, first, that the adverse effects on the Natura 2000 site in question were certain since the referring court — which had found that the proposed measures would result in the disappearance of a body of 20 hectares of tidal mudflats and tidal marshes — was able to quantify them. (50) Second, the Court found that the benefits resulting from the creation of the new habitats had already been taken into account in the national authority's assessment in demonstrating the absence of significant adverse effects on the site, even though the result of the creation of those habitats is uncertain, since it is not complete. (51)

67. Consequently, the Court considered that the circumstances of this case and *Briels* were similar, in so far as they involved, at the time of assessing the implications of the plan or project for the site concerned, the identical premiss that future benefits will mitigate the significant adverse effects on that site, even though the development measures in question have not been completed. (52) It followed that the negative implications of a plan or project not directly connected with or necessary to the management of a site and affecting its integrity do not fall within the scope of Article 6(3) of the Habitats Directive. (53)

68. In *Commission v Germany* ('Moorburg plant'), the Commission brought infringement proceedings against Germany on the grounds, *inter alia*, that it had wrongly classified a certain measure as a mitigating measure under Article 6(3) of the Habitats Directive. (54) The measure concerned a fish ladder installed near the Moorburg power plant which was intended to compensate for fish killed during the operation of the cooling mechanism for the plant which drew large quantities of water from a nearby river. That river constituted a migratory route for several fish species covered by a number of Natura 2000 areas situated upstream. (55)

69. In its judgment, the Court held that the fish ladder was intended to increase migratory fish stocks by allowing those species to reach their breeding areas more quickly and thus was expected to compensate for the fish deaths near the Moorburg plant so that the conservation objectives of the Natura 2000 areas upstream of the plant would not be significantly affected. (56) However, the impact assessment carried out by the German authorities did not contain definitive data regarding the effectiveness of the fish ladder and merely stated that its effectiveness could only be confirmed following several years of monitoring. (57) It followed that at the time the authorisation was granted, the fish ladder, even though it was intended to reduce direct significant effects on the Natura 2000 areas, could not guarantee beyond all reasonable doubt that, together with other measures designed to prevent the negative effects of drawing water from the river, the plant would not adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive. (58)

70. On this basis, I observe that in none of the foregoing rulings did the Court find that the measures proposed as part of the development plan or project in question were sufficient to amount to protective measures that avoided or reduced all direct adverse effects on the integrity of the site concerned on the basis of Article 6(3) of the Habitats Directive.

C. Application to the circumstances of these proceedings

71. I take the view that although the circumstances at issue in the foregoing rulings are not identical to the present case, certain principles elaborated in those rulings support the

finding that the measures proposed in the SHMP are insufficient to amount to protective measures that avoid or reduce the direct adverse effects on the integrity of the SPA in question on the basis of Article 6(3) of the Habitats Directive as interpreted by the Court where the SHMP excludes consideration of potential hen harrier habitat.

72. I acknowledge that the foregoing rulings were concerned with the obligations laid down in Article 6(3) of the Habitats Directive in the context of the assessment of measures proposed as part of a plan or project that had adverse effects on the integrity of a site designated for a protected habitat type under that directive. Nevertheless, I point out that starting in *Sweetman* (see point 60 of this Opinion), the Court has placed emphasis on the constitutive characteristics of the site as connected to the objectives justifying the designation of that site in the assessment of whether the measures proposed as part of a plan or project may be regarded as avoiding or reducing all direct adverse effects on the integrity of that site.

73. Moreover, in *Briels, Orleans and Commission v Germany* ('Moorburg plant'), the Court considered in substance that measures that made up for quantified loss elsewhere on the site could not be regarded as measures that sufficiently mitigated the adverse effects on the integrity of the site concerned. Further, the Court underlined, starting in *Briels*, that in principle benefits stemming from the creation of new areas of habitat which are aimed at compensating for the loss of an area and quality of the same habitat on a protected site are highly difficult to forecast with any degree of certainty (see point 63 of this Opinion).

74. In the present case, I note that the conservation objective of the SPA is to maintain or restore the favourable conservation condition of the hen harrier (see point 13 of this Opinion). I also consider that the constitutive characteristics of the SPA is thus to ensure sufficient habitat for the hen harrier in line with the conservation objective of the SPA.

75. As indicated in the schedule, the wind farm will result in the loss of an area taken out of the foraging habitat of the hen harrier within the SPA. This is quantified in the schedule as amounting to the permanent direct loss of 9 hectares of habitat and the unavailability of 162.7 hectares of habitat on account of the displacement effect of the turbines (see points 24 and 25 of this Opinion). As such, the wind farm will remove a portion of existing and potential habitat for the hen harrier. It is asserted that the measures proposed in the SHMP will maintain the same quantity of habitat in the SPA on the whole and thus avoid the adverse effects on the integrity of the SPA.

76. In my view, the measures proposed in the SHMP resemble those measures in *Briels* and *Orleans* because they may ensure a sufficient 'existing' habitat for the hen harrier, but they do not address the problem at source, that is, loss of needed lands. Also, in line with the Court's case-law, since the benefits to be expected from the measures proposed in the SHMP are to take place over the lifetime of the project, I consider that the obligation to ensure that the measures are certain beyond all reasonable doubt to avoid all direct adverse effects on the integrity of the SPA at the time of authorisation by the competent authority is not fulfilled.

77. Further, I consider that, in the particular circumstances of these proceedings, potential habitat of the hen harrier is part of the constitutive characteristics of the SPA that contributes to the favourable conservation status of the hen harrier. Thus, the significant loss of potential habitat of the hen harrier must be taken into account in the assessment of whether the measures proposed in the SHMP are sufficient to avoid or reduce the adverse effects of the wind farm on the integrity of the SPA. Potential areas within the zone protected under EU law are nothing more than areas which have not yet been managed because the changing needs of the habitat of the hen harrier have not yet required it, or are not yet ready to support hen harriers.

78. The hen harrier is a bird species that is listed in Annex I to the Birds Directive and therefore is deserving of special conservation measures concerning its habitat, according to recital 8 and Article 4 of that directive, in order to ensure its survival and reproduction in its area of distribution.⁽⁵⁹⁾ As the Court has held, 'Article 4 of the Birds Directive lays down a regime which is specifically targeted and reinforced, both for the species listed in Annex I to

the directive and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the European Union'. (60) Moreover, the obligations placed on competent national authorities to protect such species exist before any reduction in the number of birds has been observed or before the risk of a protected species becoming extinct has materialised. (61)

79. The Court's case-law emphasises the importance placed on the precautionary principle in the assessment of measures under Article 6(3) of the Habitats Directive (see points 55 and 56 of this Opinion). In my view, this applies all the more in the case of the hen harrier which has been listed in an annex to a recent Commission guidance document as a bird species considered to be particularly vulnerable to wind farms, which includes habitat displacement. (62)

80. I therefore conclude that in the circumstances of the main proceedings, measures proposed in a management plan as part of a development project which are designed to ensure that, at any given time, the amount of the site, the essential purpose of which is the provision of habitat for a protected species, which is suitable habitat for that species is not reduced and may even be enhanced, but some of the site will, for the lifetime of the development project, be excluded from having the potential to provide appropriate habitat for that species, do not meet the requirement of sufficient protective (mitigatory) measures under the Court's case-law interpreting Article 6(3) of the Habitats Directive.

VI. Conclusion

81. In light of the foregoing considerations, I propose that the Court should answer the question referred by the Supreme Court of Ireland as follows:

Where

- (a) a protected site has as its essential purpose the provision of habitat for a specified species
- (b) the nature of the habitat which is beneficial for that species means that the part of the site which is beneficial will necessarily alter over time, and
- (c) as part of a proposed development a management plan for the site as a whole (including changes to the management of parts of the site not directly affected by the development itself) is to be put in place which is designed to ensure that, at any given time, the amount of the site suitable as habitat as aforesaid is not reduced and indeed may be enhanced; but
- (d) some of the site will, for the lifetime of the development project, be excluded from having the potential to provide appropriate habitat,

such measures as are described in (c) cannot be regarded as protective measures forming part of that plan or project aimed at avoiding or reducing any direct adverse effects on the integrity of the site, in order to ensure that that plan or project does not adversely affect the integrity of the site under 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.

1 Original language: English.

2 See e.g. the film produced as part of the Skydancer Conservation Project (2011-2015) of the Royal Society for the Protection of Birds aimed at promoting the conservation of hen harriers in England, available at <https://www.rspb.org.uk/our-work/conservation/conservation-and-sustainability/safeguarding-species/skydancer>.

3 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version) (OJ 2010 L 20, p. 7).

4 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).

5 Opinion of Advocate General Kokott in *Commission v Bulgaria*, C-141/14, EU:C:2015:528, point 1. See e.g. judgments of 21 July 2011, *Azienda Agro-Zootecnia Franchini and Eolica di Altamura*, C-2/10, EU:C:2011:502, and of 14 January 2016, *Commission v Bulgaria*, C-141/14, EU:C:2016:8.

6 See e.g. BirdWatch Ireland, 'The bird behind the headlines: getting to know the Hen Harrier', *eWings* Issue 64, January 2015, available at: <http://www.birdwatchireland.ie>.

7 E.g. the hen harrier is included in the IUCN (International Union for Conservation of Nature and Natural Resources) Red List of Threatened Species 2016, available at <http://www.iucnredlist.org>.

8 The hen harrier has been listed in Annex I to the Birds Directive since the adoption of the original Birds Directive (Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), and even earlier starting with the Commission's initial proposal for that directive. See Proposal for a Council Directive on bird conservation, COM(76) 676 final, Annex I.

9 See also recital 8 of the Birds Directive which provides in relevant part: 'Certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution.'

10 S.I. No 587/2011 — European Communities (Conservation of Wild Birds (Slievefelim to Silvermines Mountains Special Protection Area 004165)) Regulations 2011, schedule 3, available at <http://www.irishstatutebook.ie/eli/2011/si/588/made/en/print>.

11 The order for reference indicates that the SPA comprises a total area of 20 935 hectares. See also Natura 2000 Standard Data Form for Site IE0004165, Slievefelim to Silvermines Mountains SPA, available at <https://www.npws.ie/sites/default/files/protected-sites/natura2000/NF004165.pdf> ('Natura 2000 Standard Data Form').

12 Conservation Objectives for Slievefelim to Silvermines Mountains SPA [004165], dated 15 August 2016, available at https://www.npws.ie/sites/default/files/protected-sites/conservation_objectives/CO004165.pdf.

13 Natura 2000 Standard Data Form; Site Synopsis for Slievefelim to Silvermines Mountains SPA, available at <https://www.npws.ie/sites/default/files/protected-sites/synopsis/SY004165.pdf>.

14 Judgment of 13 December 2007, *Commission v Ireland*, C-418/04, EU:C:2007:780, paragraph 105; see also *ibid.*, paragraphs 170 to 175. Of note, the hen harrier was also mentioned in the context of a previous infringement action against Ireland: see Opinion of Advocate General La Pergola in *Commission v Ireland*, C-392/96, EU:C:1998:612, point 45; as well as against France: see judgment of 7 December 2000, *Commission v France*, C-374/98, EU:C:2000:670, paragraph 16, and Opinion of Advocate General Alber in *Commission v France*, C-374/98, EU:C:2000:86, point 35.

15 In their written submissions, ESB Wind Development and Coillte state that the electricity generated by the wind farm will be supplied into the national electricity network and will displace fossil fuel-derived electricity as part of the Irish Government's commitment to combating climate change and reducing greenhouse gas emissions.

16 Generally, closed canopy forest is when the tops of the trees overlap to form a virtually continuous layer, whereas with open canopy forest, they are more widely spaced, thereby leaving open sunlit areas. See e.g. Michael Allaby, editor, *A Dictionary of Plant Sciences*, Third edition, Oxford University Press, 2012 and 2013.

17 According to the schedule, the SHMP has three principal objectives: (1) to restore areas of blanket bog and wet heath (the natural habitats of the area) in two specified locations within the site; (2) to provide areas of optimum habitat for hen harriers, red grouse and other wildlife within the site during the lifetime of the project; and (3) to provide a corridor linking areas of suitable bog habitat for hen harriers.

18 See points 56 and 57 of this Opinion.

19 Judgment of 11 April 2013, *Sweetman and Others*, C-258/11, EU:C:2013:220 ('*Sweetman*').

20 Judgment of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330 ('*Briels*').

21 Judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583 ('*Orleans*').

22 Judgment of 26 April 2017, *Commission v Germany*, C-142/16, EU:C:2017:301.

23 I note that the question referred does not pertain to the potential impacts of the wind farm set out in the schedule concerning the construction activity and the collision effect (see points 26, 27 and 30 of this Opinion). Thus, I will not consider them further.

24 See e.g. judgment of 24 November 2011, *Commission v Spain*, C-404/09, EU:C:2011:768, paragraph 97 and the case-law cited.

25 Opinion of Advocate General Sharpston in *Sweetman*, C-258/11, EU:C:2012:743, points 41 to 45.

26 See e.g. *Orleans*, paragraph 32 and the case-law cited.

27 See e.g. *Orleans*, paragraphs 43 and 44.

28 See e.g. *Orleans*, paragraph 46 and the case-law cited. See also Opinion of Advocate General Sharpston in *Sweetman*, points 45 to 51.

29 See e.g. *Commission v Germany*, paragraph 33 and the case-law cited. My emphasis. See also e.g. *Briels*, paragraph 27 and the case-law cited, and Opinion of Advocate General Bot in *Commission v Poland*, C-441/17, EU:C:2018:80, point 154.

30 See e.g. *Commission v Germany*, paragraph 42 and the case-law cited.

31 See e.g. Judgment of 7 September 2004, *Waddenvereniging and Vogelsbeschermingsvereniging*, C-127/02, EU:C:2004:482 ('*Waddenzee*'), paragraphs 57 and 58.

32 See e.g. *Orleans*, paragraph 54 and the case-law cited. My emphasis.

33 The term 'mitigation measures' is used in the literature and in EU texts, in particular the Commission guidance documents on Article 6 of the Habitats Directive, available at http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm.

34 *Orleans*, paragraph 57. See also judgment of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 25.

35 *Briels*, paragraph 33; *Orleans*, paragraph 58.

36 See *Briels*, paragraph 29, and Opinion of Advocate General Sharpston in *Briels*, C-521/12, EU:C:2014:113, points 29 to 36 and 46 to 51. See also e.g. Commission Guidance Document on Article 6(4) of the 'Habitats Directive' 92/43/EEC (2007/2012), available at note 33, point 1.4. Pursuant to Article 6(4) of the Habitats Directive, 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 still be carried out for imperative reasons of overriding public interest, the Member State authorities must take all 'compensatory measures' necessary to ensure that the overall coherence of Natura 2000 is protected and inform the Commission of the compensatory measures adopted. Thus, the national authorities may grant an authorisation under Article 6(4) only in so far as the conditions set down therein are complied with. See e.g. *Orleans*, paragraphs 60 to 63 and the case-law cited.

37 *Sweetman*, paragraphs 11 to 12 and 26.

38 *Sweetman*, paragraph 39. My emphasis. See also e.g. *Briels*, paragraph 21, and *Orleans*, paragraph 47.

39 *Sweetman*, paragraph 45.

40 *Sweetman*, paragraph 45.

41 *Sweetman*, paragraphs 46 to 48.

42 *Briels*, paragraphs 9 and 10.

43 *Briels*, paragraphs 12, 13 and 18.

44 *Briels*, paragraph 31.

45 *Briels*, paragraph 32. See also e.g. *Orleans*, paragraph 52.

46 *Briels*, paragraph 32.

47 Opinion of Advocate General Sharpston in *Briels*, point 40.

48 Opinion of Advocate General Sharpston in *Briels*, points 41 and 42.

49 *Orleans*, paragraphs 11 to 16, 20, 21 and 30.

50 *Orleans*, paragraphs 37 and 55.

51 *Orleans*, paragraph 55.

52 *Orleans*, paragraph 56.

53 *Orleans*, paragraph 59.

54 *Commission v Germany*, paragraphs 9 and 14.

55 *Commission v Germany*, paragraphs 6 and 7.

56 *Commission v Germany*, paragraph 36.

57 *Commission v Germany*, paragraph 37.

58 *Commission v Germany*, paragraphs 35 and 38.

59 See point 12 of this Opinion. See also, in this regard, Commission-funded Case studies compilation report on the Article 6.3 permit procedure under the Habitats Directive (June 2013), available at note 33, Case Study 1: Adopting a systematic approach to the screening and AA [Appropriate Assessment] of plans and projects relating to forest activities (Ireland), p. 10 (noting that the hen harrier is one of the key species found in areas where forestry-related decision-making is important and 'continue[s] to be seriously at risk, with the [hen harrier] in decline in SPAs').

60 See e.g. judgment of 14 October 2010, *Commission v Austria*, C-535/07, EU:C:2010:602, paragraph 57 and the case-law cited.

61 See e.g. judgment of 24 November 2016, *Commission v Spain*, C-461/14, EU:C:2016:895, paragraph 83 and the case-law cited. See also Opinion of Advocate General Wahl in *Commission v Spain*, C-461/14, EU:C:2016:110, point 72.

62 Commission Guidance Document, Wind energy developments and Natura 2000 (2011), available at note 33, Annex II. Of note, this correlates with the recent research project 'Windharrier – Interactions between hen harriers and wind turbines' (2012-2014) concerning particular issues with hen harriers and wind power in Ireland, available at <https://www.ucc.ie/en/forestecology/research/windharrier/>.

