Submission	
Submitter:	Mr. Peter Sweetman
Submission Title:	Submission
Submission Reference No.:	S011188
Submission Received:	15 June 2023
Application	
Applicant:	Mr. Kevin Keenan
Reg. No.:	P1167-01

See below for Submission details.

Attachments are displayed on the following page(s).

Submission by Peter Sweetman and on behalf of Wild Ireland Defence CLG

We wish to make a submission on the attach Intensive agriculture applications.

The EPA must assess the disposal of the waste from these developments.

The attached Judgement of the CJEU is attached as some of your inspectors appear unable to find it.

P0408-02	DDS BRADY FARMS LIMITED
P0412-02	Harvest Lodge Pigs Limited
P0446-03	Mr Michael Monagle
P0447-02	Ashleigh Farms (Waterford) Limited
P0467-03	Woodville Pig Farms Limited
P0515-02	Laragan Farms Limited
P0790-03	Mr. Eoin O'Brien
P0871-03	Mr Vincent Quinn
P0915-02	Ballyfaskin Enterprises Ltd
P1024-02	Doon Farm Enterprises Limited
P1132-02	S. Wilkin And Sons Limited
P1148-01	M.A.G. World Limited
P1152-01	Lisgillan Farm Ltd.
P1154-01	Mr. Stephen Moffett
P1157-01	Mullan Poultry Products Ltd.
P1158-01	Millrace Poultry Limited
P1159-01	Longfield Poultry Unlimited Company
P1160-01	Knockronaghan Farm Limited
P1161-01	Annaglough Farm Limited
P1162-01	Mr. Brendan Duffy
P1164-01	Mr. Aidan Brady
P1167-01	Mr. Kevin Keenan
P1175-01	Woodburn Farms Limited
P1176-01	Mr. Killian Smith
P1179-01	Mr. Jerry McAuliffe
P1183-01	O'Connell Poultry Farms Limited
P1195-01	Dan Hennessy Farm Limited

We would like to remind the EPA that Article 6 of the Habitats Directive as interpreted by the CJEU means the following.

The threshold for screening for Appropriate Assessment is set out in Kelly -v- An Bord Pleanála [2014] IEHC 400 (25 July 2014) which states at 26. attached
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.

This point is further explained in the CJEU decision In Case C-323/17, People Over Wind and Peter Sweetman v Coillte Teoranta which states attached.

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

The threshold the any decision to grant permission must pass in this context is explained in paragraph 44 of CJEU Case 258/11 attached.

"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."

The Courts of Justice of the European Union has decided in Cases C-293/17 and C-294/17 the following: attached

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

1. *Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that the grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.*

2011-258

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 is 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]

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* Language of the case: English.

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 Pleanala

(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 Pleanala (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 heben’, 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 kennmerken’ (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.

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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.

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

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

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

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

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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.

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14 – See points 20 to 22 above.

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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.

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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.

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

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

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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.

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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.

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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.

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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.

JUDGMENT OF THE COURT (First Chamber)

17 October 2018 (*)

(Reference for a preliminary ruling — Environment — Assessment of the effects of certain projects on the environment — Right to challenge a development consent decision — Requirement for a procedure which is not prohibitively expensive — Concept — Temporal application — Direct effect — Effect on a national decision on the taxation of costs which has become final)

In Case C-167/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 23 March 2017, received at the Court on 3 April 2017, in the proceedings

Volkmar Klohn

v

An Bord Pleanála,

interveners:

Sligo County Council,

Maloney and Matthews Animal Collections Ltd,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President, acting as President of the First Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, E. Regan and C.G. Fernlund, Judges,

Advocate General: M. Bobek,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 February 2018,

after considering the observations submitted on behalf of:

– Mr Klohn, by himself and by B. Ohlig, advocate,

– An Bord Pleanála, by A. Doyle, Solicitor, and by B. Foley, Barrister-at-Law,

– Ireland, by M. Browne, G. Hodge and A. Joyce, acting as Agents, and by M. Gray and H. Godfrey, Barristers-at-Law, and R. Mulcahy, Senior Counsel,

– the European Commission, by C. Zadra, G. Gattinara and J. Tomkin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the fifth paragraph of Article 10a of 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), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337 as amended').

2 The request has been made in proceedings between Mr Volkmar Klohn and An Bord Pleanála (the Planning Appeals Board, Ireland) ('the Board') concerning the burden of the costs of the judicial proceedings brought by Mr Klohn against the planning permission granted by the Board for the construction in Achonry, County Sligo (Ireland) of a fallen animal inspection unit for animals from across Ireland.

Legal context

International law

3 The preamble to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed at Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1, 'the Aarhus Convention'), states:

'...

Recognising also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

...

Concerned that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced,

…'

4 Article 1 of the Aarhus Convention, entitled 'Objective', provides:

'In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.'

5 Article 3 of that convention, entitled 'General provisions', states, in paragraph 8:

'Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.'

6 Article 9 of the Aarhus Convention, entitled 'Access to justice', states:

'1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

…

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5), shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

...

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.'

EU law

7 Directive 85/337 as amended provides that public and private projects likely to have a major effect on the environment are to be subject to an environmental

impact assessment. It also lays down obligations on the participation and consultation of the public in the decision-making process regarding the consent for such projects.

8 Following the accession of the European Union to the Aarhus Convention, the EU legislature adopted Directive 2003/35, Article 3(7) of which inserted Article 10a into Directive 85/337, which provides:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

9 As provided for in the first paragraph of Article 6 of Directive 2003/35, 'Member States shall bring into force the laws, regulations and administrative

provisions necessary to comply with this Directive by 25 June 2005 at the latest. They shall forthwith inform the Commission thereof'.

10 Article 10a of Directive 85/337 as amended was reproduced in Article 11 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

Irish law

11 The Irish system of judicial review comprises two stages. Applicants must first of all apply to the High Court (Ireland) for leave to bring judicial review proceedings, setting out the grounds for their application and the relief sought. It is only if that leave is granted that proceedings may be brought.

12 Under Article 99 of the rules of the Superior Courts 'costs [shall] follow the event'. Consequently, an applicant who is unsuccessful is to be ordered, as a rule, to pay the other party's costs in addition to bearing his own costs. That is the general rule, but the High Court has discretion to depart from that rule if the particular circumstances of the case so require.

13 The court hearing the case rules only on how the costs are to be borne. Subsequently, the amount of costs awarded against the unsuccessful party is quantified in a separate decision by the Taxing Master, a judge specially entrusted with the taxation of costs, in the light of the supporting documents provided by the successful party. That decision is open to appeal.

14 In its judgment of 16 July 2009, *Commission* v *Ireland* (C-427/07, EU:C:2009:457, paragraphs 92 to 94), the Court held that Ireland had failed to transpose into national law the rule in Article 10a of Directive 85/337 as amended according to which procedures must 'not [be] prohibitively expensive'.

15 In the course of 2011, in order to give due effect to the finding of a failure to fulfil obligations on that point, Ireland inserted Section 50B in the Planning and Development Act, so that in the field of application of that law, each party is, as a rule, obliged to bear its own costs. That provision is not, however, applicable, *ratione temporis* to the main proceedings.

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

16 In the course of 2004, the Board granted Maloney and Matthews Animal Collections Ltd planning permission to construct in Achonry an inspection unit for fallen animals from across Ireland. The building of that unit had been

decided as part of the response to the bovine spongiform encephalopathy epizootic.

17 On 24 June 2004, Mr Klohn, owner of a farm close to the site of that facility, applied for leave to seek judicial review of that planning permission. On 31 July 2007, he was granted leave to commence judicial review proceedings.

18 By judgment dated 23 April 2008, the High Court dismissed Mr Klohn's application for judicial review.

19 On 6 May 2008, that court ordered Mr Klohn to pay the costs incurred by the Board. That decision has not been challenged.

20 Before the Taxing Master of the High Court, charged with quantifying the amount of the costs to be reimbursed in accordance with national law, Mr Klohn argued that, pursuant to Article 3(8) and Article 9(4) of the Aarhus Convention and Article 10a of Directive 85/337 as amended, costs awarded against him should not be 'prohibitively expensive'.

21 By a decision of 24 June 2010, the Taxing Master took the view that under Irish law he did not have powers to enter into a consideration of the prohibitive nature of that expense and he assessed the costs which Mr Klohn would have to reimburse the Board at approximately EUR 86 000.

22 After receiving a request from Mr Klohn to review the Taxing Master's decision, the High Court upheld that decision.

23 Mr Klohn then appealed against that judgment of the High Court to the Supreme Court (Ireland).

24 The Supreme Court decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can the "not prohibitively expensive" provisions of Article 10a of [Directive 85/337 as amended] potentially have any application in a case such as the instant case where the development consent challenged in the proceedings was granted prior to the latest date for transposition of that directive and where the proceedings challenging the relevant development consent were also commenced prior to that date? If so have the "not prohibitively expensive" provisions of [Directive 85/337 as amended] potential application to all costs incurred in the proceedings or only to costs incurred after the latest date for transposition?

(2) Is a national court which enjoys a discretion concerning the award of costs against an unsuccessful party, in the absence of any specific measure having been adopted by the Member State in question for the purposes of

transposing Article 10a of [Directive 85/337 as amended], obliged, when considering an order for costs in proceedings to which that provision applies, to ensure that any order made does not render the proceedings "prohibitively expensive" either because the relevant provisions are directly effective or because the court of the Member State concerned is required to interpret its national procedural law in a manner, to the fullest extent possible, which fulfils the objectives of Article 10a?

(3) Where an order for costs is unqualified and would, by virtue of the absence of any appeal, be regarded as final and conclusive as a matter of national law, does Union law require that either:

(a) a Taxing Master charged in accordance with national law with the task of quantifying the amount of costs reasonably incurred by the successful party; or,

(b) a court asked to review a decision of such a Taxing Master

nonetheless have an obligation to depart from otherwise applicable measures of national law and determine the amount of costs to be awarded in such a way as ensures that the costs so awarded do not render the proceedings prohibitively expensive?'

Consideration of the questions referred

The second question

25 By its second question, which must be examined first, the referring court asks, in essence, whether the requirement that certain judicial proceedings in environmental matters must not be prohibitively expensive ('the not prohibitively expensive rule'), in the fifth paragraph of Article 10a of Directive 85/337 as amended, is directly effective or whether the national court must only interpret national law in a manner, to the fullest extent possible, which achieves an outcome consistent with the objective pursued by that rule.

26 The question of the direct effect of the not prohibitively expensive rule is at issue in the main proceedings as a result of Ireland's failure to transpose the fifth paragraph of Article 10a of Directive 85/337 as amended, within the period laid down in Article 6 of Directive 2003/35, that is by 25 June 2005 at the latest. That failure to fulfil obligations was found by the Court in its judgment of 16 July 2009, *Commission* v *Ireland* (C-427/07, EU:C:2009:457, paragraphs 92 to 94 and operative part). It is also apparent from the explanations provided by the referring court that it was not until 2011 that a national provision was adopted to transpose the not prohibitively expensive rule into national law, that is after the decision on the substance ending the

judicial proceedings for which the taxation of costs is at issue in the main proceedings.

27 It must be borne in mind that provisions of EU law are directly applicable when they confer on individuals rights enforceable by them in the courts of a Member State (judgment of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraphs 4 and 8).

28 Such provisions impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the EU institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power (judgment of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraph 6).

29 In that regard, it must be borne in mind, first, that the fifth paragraph of Article 10a of Directive 85/337 as amended simply provides that the judicial proceedings concerned 'shall be fair, equitable, timely and not prohibitively expensive'. Given the general nature of the words used, it is difficult to envisage how those provisions may be regarded as imposing sufficiently precise obligations on the Member States in order to dispense with national implementing measures.

30 Next, the Court has held that, by virtue of their procedural autonomy and subject to compliance with the principles of equivalence and effectiveness, the Member States have a discretion in implementing Article 10a of Directive 85/337 as amended (judgments of 16 February 2012, *Solway and Others*, C-182/10, EU:C:2012:82, paragraph 47, and of 7 November 2013, *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraph 30).

31 Above all, lastly, the Court has ruled on the direct effect of the not prohibitively expensive rule. That rule is also found in very similar terms in Article 9(4) of the Aarhus Convention. That similarity is not a coincidence, since Directive 2003/35, which inserted Article 10a into Directive 85/337, had indeed sought to align Community law with the Aarhus Convention with a view to its approval by the Community, as is apparent from recital 5 of Directive 2003/35.

32 The Court has held in its judgment of 15 March 2018, *North East Pylon Pressure Campaignand Sheehy* (C-470/16, EU:C:2018:185, paragraphs 52 and 58), that Article 9(4) of the Aarhus Convention is not directly applicable.

33 As the Court does not assess the direct applicability of the provisions of an agreement signed by the European Union according to criteria other than those that it uses in order to determine whether the provisions of a directive are directly applicable (see, to that effect, judgment of 30 September

1987, *Demirel*, 12/86, EU:C:1987:400, paragraph 14), it may also be concluded from the judgment mentioned in the preceding paragraph that the not prohibitively expensive rule in the fifth paragraph of Article 10a of Directive 85/337 as amended does not have direct effect.

34 Given that the provisions of Directive 85/337 as amended at issue do not have direct effect and were transposed belatedly into the legal system of the Member State concerned, the national courts of that Member State are required to interpret national law so far as possible, once the time limit for the Member States to transpose those provisions has expired, with a view to achieving the objective sought by those provisions, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive (see, to that effect, judgment of 4 July 2006, *Adelener and Others*, C-212/04, EU:C:2006:443, paragraph 115 and operative part).

35 The objective pursued by the EU legislature when it laid down the not prohibitively expensive rule in Article 10a of Directive 85/337 as amended means that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts, which falls within the scope of that provision, by reason of the financial burden that might arise as a result (judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraph 35). That objective, which is to give the public concerned wide access to justice, pertains, more broadly, to the desire of the EU legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role, and to ensure that the right to an effective remedy and the principle of effectiveness are observed (see, to that effect, judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraphs 31 to 33).

36 In the light of the foregoing considerations, the answer to the second question is that the fifth paragraph of Article 10a of Directive 85/337 as amended must be interpreted as meaning that the not prohibitively expensive rule which it lays down does not have direct effect. Where that article has not been transposed by a Member State, the national courts of that Member State are nonetheless required to interpret national law to the fullest extent possible, once the time limit for transposing that article has expired, in such a way that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts, which falls within the scope of that article, by reason of the financial burden that might arise as a result.

The first question

37 By its first question, the referring court asks, in essence, whether the not prohibitively expensive rule laid down in Article 10a of Directive 85/337 as

amended applies to proceedings such as those at issue in the main proceedings, brought before the date on which the time limit for transposing that article expired. If that question is answered in the affirmative, the referring court also asks whether that rule applies to all the costs incurred in the context of those proceedings or only to those incurred after that time limit expired.

38 According to the settled case-law of the Court, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule (judgments of 11 December 2008, *Commission* v *Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 43 and the case-law cited; of 6 July 2010, *Monsanto Technology*, C-428/08, EU:C:2010:402, paragraph 66; and of 6 October 2015, *Commission* v *Andersen*, C-303/13 P, EU:C:2015:647, paragraph 49).

39 It is otherwise — subject to the principle of the non-retroactivity of legal acts — only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (judgment of 16 December 2010, *Stichting Natuur en Milieu and Others*, C-266/09, EU:C:2010:779, paragraph 32).

40 Accordingly, the measures taken to transpose a directive must apply to the future effects of situations which arose under the old rule, as from the date on which the time limit for transposing that directive expired, unless that directive provides otherwise.

41 Directive 2003/35 does not include any special provision as regards the conditions for the temporal application of Article 10a of Directive 85/337 as amended (judgment of 7 November 2013, *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraph 23).

42 In that regard, the Court has held that Article 10a of Directive 85/337 as amended is to be interpreted as meaning that the rules of national law adopted in order to transpose that article into the national legal order ought to apply to administrative development consent procedures ongoing as at the date on which the time limit for transposing that provision expired (see, to that effect, judgment of 7 November 2013, *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraph 31).

43 Where no implementing measure has been adopted before the time limit laid down by a directive, as is the case in the main proceedings, it must be considered that the obligation to interpret national law in conformity with the untransposed rule applies also in the conditions referred to in paragraphs 39 and 40 above, as from the expiry of that time limit.

44 In that situation, the national court is under an obligation to interpret national law, so far as possible, in order to achieve the result sought by the untransposed provisions of a directive, as pointed out in paragraph 35 above. The immediate applicability of a new rule stemming from a directive to the future effects of existing situations, as from the expiry of the time limit for transposing that directive, forms part of that result, unless the directive concerned has provided otherwise.

45 Consequently, national courts are required to interpret national law, as soon as the time limit for transposing an untransposed directive expires, so as to render the future effects of situations which arose under the old rule immediately compatible with the provisions of that directive.

46 In the light of the objective of the not prohibitively expensive rule, which consists in altering the allocation of costs in certain judicial proceedings, proceedings brought before the expiry of the time limit for transposing Directive 2003/35 must be regarded as a situation which arose under the old rule. In addition, the decision on the allocation of costs taken by the court at the end of the proceedings represents a future, indeed uncertain, effect of the ongoing proceedings. Consequently, national courts are under an obligation, when deciding on the allocation of costs in proceedings which were ongoing as at the date on which the time limit for transposing that directive expired, to interpret national law in order to achieve so far as possible an outcome consistent with the objective pursued by the not prohibitively expensive rule.

47 In that regard, there is no need to distinguish between costs depending on whether they have in practice been incurred before or after the end of the transposition period, provided that the decision on the allocation of costs has not been taken as at that date and that therefore the obligation to interpret national law in conformity with the not prohibitively expensive rule is applicable to that decision, as stated in the preceding paragraph. In addition, the Court has held that the prohibitive nature of proceedings must be assessed as a whole, taking into account all the costs borne by the party concerned (judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraph 28).

48 However, the obligation of a national court to refer to the content of a directive when interpreting and applying the relevant rules of national law is limited by the general principles of law, in particular, the principles of legal certainty and non-retroactivity (judgment of 8 November 2016, *Ognyanov*, C-554/14,EU:C:2016:835, paragraph 63 and the case-law cited).

49 In that regard, the Board submits that the immediate applicability of the not prohibitively expensive rule to ongoing proceedings is contrary to the principle of legal certainty. It argues that the rule on the allocation of costs, as known at

the outset of the proceedings, influenced the amount of the costs which the parties decided to commit to defending their rights.

50 Admittedly, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, inter alia, that rules of law be clear, precise and predictable in their effect, especially where they may have negative consequences on individuals and undertakings (judgment of 22 June 2017, *Unibet International*, C-49/16, EU:C:2017:491, paragraph 43 and the case-law cited).

51 In addition, the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation in which it is clear that the relevant authorities have, in giving him precise assurances, caused him to entertain expectations which are justified (see, to that effect, judgment of 14 October 2010, *Nuova Agricast and Cofra* v *Commission*, C-67/09 P, EU:C:2010:607, paragraph 71).

52 However, in the main proceedings, it must be stated that the parties did not receive any assurances that the rule on the allocation of costs would be maintained in force until the end of the proceedings. On the contrary, from the outset of those proceedings, on 24 June 2004, the date on which Mr Klohn applied for leave to seek judicial review, they could envisage, having regard to Ireland's obligations under Directive 2003/35 which entered into force on 25 June 2003, that that rule would have to be amended before long and by 25 June 2005 at the latest, that is to say probably before the end of those proceedings. In particular, Ireland and the Board in its capacity as a body of that Member State may not rely on a legitimate expectation that a rule would remain in force which Ireland failed to amend, notwithstanding its obligation to amend it within the period laid down by that directive, as found by the Court in its judgment of 16 July 2009, *Commission* v *Ireland* (C-427/07, EU:C:2009:457).

53 Lastly, the Court has held that the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule (judgment of 6 October 2015, *Commission* v *Andersen*, C-303/13 P, EU:C:2015:647, paragraph 49).

54 Consequently, the Board is not justified in maintaining that the principle of legal certainty precludes the obligation for the national courts to interpret national law in conformity with the not prohibitively expensive rule when ruling on the allocation of costs.

55 In the light of the foregoing considerations, the answer to the first question is that the fifth paragraph of Article 10a of Directive 85/337 as amended must be

interpreted as meaning that a Member State's courts are under an obligation to interpret national law in conformity with that directive, when deciding on the allocation of costs in judicial proceedings which were ongoing as at the date on which the time limit for transposing the not prohibitively expensive rule laid down in the fifth paragraph of Article 10a expired, irrespective of the date on which those costs were incurred during the proceedings concerned.

The third question

56 For a proper understanding of the third question, it should be noted at the outset that the Irish costs procedure takes place in two stages. Following its decision on the substance, the court hearing the dispute initially makes an order as to how the costs are to be borne. Subsequently, the Taxing Master fixes the amount of costs, subject to review by a court, namely the High Court, and then if necessary, the Supreme Court.

57 According to the information provided by the referring court concerning the procedure at issue in the main proceedings, the High Court, after dismissing Mr Klohn's application, ordered him on 6 May 2008 to pay the Board's costs, in accordance with Article 99 of the Rules of the Superior Courts, according to which 'costs [shall] follow the event'. That decision became final, since it was not challenged within the time limits set. The Taxing Master quantified the costs Mr Klohn had to reimburse the Board at approximately EUR 86 000, by a decision dated 24 June 2010, which was challenged before the High Court and then the referring court.

58 In the light of those factors, the third question must be understood as seeking to ascertain whether, in the main proceedings, having regard to the force of *res judicata* attaching to the High Court's decision of 6 May 2008, which became final as to how the costs are to be borne, national courts ruling on Mr Klohn's application challenging the Taxing Master's decision fixing the amount of costs are required to interpret national law so that he does not bear prohibitively expensive costs.

59 According to settled case-law, when national courts apply national law, they are required to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU (judgment of 4 July 2006, *Adelener and Others*, C-212/04, EU:C:2006:443, paragraph 108 and the case-law cited).

60 The requirement for national law to be interpreted in conformity with EU law is inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them (judgment of 4 July

2006, *Adelener and Others*, C-212/04, EU:C:2006:443, paragraph 109 and the case-law cited).

61 However, the principle of interpreting national law in conformity with EU law has certain limitations.

62 First, as mentioned in paragraph 48 above, the obligation of a national court to refer to the content of a directive when interpreting and applying the relevant rules of national law is limited by the general principles of law.

63 In that regard, the principle of *res judicata* is, both in the legal order of the European Union and in national legal systems, of particular importance. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become final after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard can no longer be called into question (judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 38 and the case-law cited).

64 EU law does not, therefore, preclude the application of national procedural rules conferring *res judicata* effects on a judicial decision (judgment of 20 March 2018, *Di Puma and Consob*, C-596/16 and C-597/16, EU:C:2018:192, paragraph 31 and the case-law cited).

65 Secondly, the obligation for national law to be interpreted in conformity with EU law ceases when national law cannot be interpreted so as to achieve a result which is compatible with that sought by the directive concerned. In other words, the principle that national law is to be interpreted in conformity with EU law cannot serve as the basis for an interpretation of national law *contra legem* (judgments of 4 July 2006, *Adelener and Others*, C-212/04, EU:C:2006:443, paragraph 110, and of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 100).

66 The Court points out that when a matter is brought before it under Article 267 TFEU, it does not have jurisdiction to assess whether the abovementioned limits preclude an interpretation of national law in conformity with a rule of EU law. Generally, it is not for the Court, when giving a preliminary ruling, to interpret national law (judgment of 1 December 1965, *Dekker*, 33/65 EU:C:1965:118), since the national court has sole jurisdiction in that regard (see, to that effect, judgment of 26 September 2013, *Ottica New Line*, C-539/11, EU:C:2013:591, paragraph 48).

67 It is, therefore, for the referring court to assess the force of *res judicata* attaching to the decision of 6 May 2008 by which the High Court ordered Mr Klohn to bear the costs of the proceedings concerned, so as to

determine if and to what extent national law may be interpreted in conformity with the not prohibitively expensive rule in the main proceedings.

68 In those circumstances, the Court may only provide clarification designed to give the national court guidance in its assessment (judgment of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 77) and indicate to it which interpretation of national law would fulfil its obligation to interpret that law in conformity with EU law.

69 In that regard, the Court notes that the purpose of the High Court's decision of 6 May 2008 as to how the costs are to be borne, ordering inter alia Mr Klohn to pay the Board's costs, is not the same as the Taxing Master's decision giving rise to the judicial proceedings before the referring court, in that, in particular, the former decision did not fix the precise amount of the costs awarded against the applicant in the main proceedings. According to the Court's case-law, the force of *res judicata* extends only to the legal claims on which the court has ruled. It does not, therefore, preclude the Taxing Master or a court, in a later dispute, from ruling on points of law on which there is no ruling in that definitive decision (see, to that effect, judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 36).

70 In addition, an interpretation according to which, having regard to the close connection between the decision as to how the costs are to be borne and the decision quantifying those costs, the Board would be entitled to claim all the costs reasonably incurred for its defence, would be contrary to the principle of legal certainty and the requirement for the foreseeability of EU law. As the Advocate General observed in point 114 of his Opinion, Mr Klohn could not have been aware of the amount of the costs which he might have to reimburse the successful parties until the Taxing Master's decision delivered more than a year after the decision awarding costs against him, and could not, therefore, challenge the first of those decisions with full knowledge of the facts. The amount of the Board's costs which were recoverable as determined by the Taxing Master was all the more unforeseeable by Mr Klohn since it was around three times the amount of the costs which he himself had incurred in the procedure concerned.

71 The answer to the third question is, therefore, that the fifth paragraph of Article 10a of Directive 85/337 as amended must be interpreted as meaning that, in a dispute such as that at issue in the main proceedings, the national court called upon to rule on the amount of costs is under an obligation to interpret national law in conformity with that directive, in so far as the force of *res judicata* attaching to the decision as to how the costs are to be borne, which has become final, does not preclude this, which it is for the national court to determine.

Costs

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

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

1. **The fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that the requirement that certain judicial proceedings in environmental matters must not be prohibitively expensive which it lays down does not have direct effect. Where that article has not been transposed by a Member State, the national courts of that Member State are nonetheless required to interpret national law to the fullest extent possible, once the time limit for transposing that article has expired, in such a way that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts, which falls within the scope of that article, by reason of the financial burden that might arise as a result.**

2. **The fifth paragraph of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that a Member State's courts are under an obligation to interpret national law in conformity with that directive, when deciding on the allocation of costs in judicial proceedings which were ongoing as at the date on which the time limit for transposing the requirement, laid down in the fifth paragraph of Article 10a, that certain judicial proceedings in environmental matters must not be prohibitively expensive expired, irrespective of the date on which those costs were incurred during the proceedings concerned.**

3. **The fifth paragraph of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that, in a dispute such as that at issue in the main proceedings, the national court called upon to rule on the amount of costs is under an obligation to interpret national law in conformity with that directive, in so far as the force of *res judicata* attaching to the decision as to how the costs are to be borne,**

which has become final, does not preclude this, which it is for the national court to determine.

Silva de Lapuerta Bonichot Arabadjiev

Regan Fernlund

Delivered in open court in Luxembourg on 17 October 2018.

A. Calot Escobar K. Lenaerts

Registrar President

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* Language of the case: English.

2017-323j

JUDGMENT OF THE COURT (Seventh Chamber)

12 April 2018 (*)

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

In Case C-323/17,

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

People Over Wind,

Peter Sweetman

v

Coillte Teoranta,

THE COURT (Seventh Chamber),

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

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– People Over Wind and Mr Sweetman, by O. Clarke, Solicitor, O. Collins, Barrister-at-Law, and J. Devlin, Senior Counsel,

– Coillte Teoranta, by J. Conway, Solicitor, S. Murray, Barrister-at-Law, and D. McGrath, Senior Counsel,

– the European Commission, by C. Hermes and E. Manhaeve, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive').

2 The request has been made in proceedings brought by People Over Wind, an environmental NGO, and by Peter Sweetman against Coillte Teoranta ('Coillte'), a company owned by the Irish State that operates in the forestry sector, relating to the works necessary to lay the cable connecting a wind farm to the electricity grid.

Legal context

EU law

3 The 10th recital of the Habitats Directive states:

'… an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'.

4 Article 2 of the Habitats Directive provides:

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

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

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

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

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

...'

6 Article 6 of the Habitats Directive states:

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

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

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

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

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

Irish law

7 The High Court (Ireland) explains that development consent is regulated by the Planning and Development Acts and regulations made thereunder. The competent authority is the local planning authority and an appeal lies to An Bord Pleanála (the Irish Planning Board).

8 Certain types of development are classified as 'exempted development' and, subject to certain exceptions, do not require consent under the Planning and Development Acts. Thus, an example of exempted development is 'the carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking'.

9 Nevertheless, 'exempted development' projects may be subject to other types of consent or a process of adoption. The European Communities (Birds and Natural Habitats) Regulations 2011 ('the 2011 Regulations') apply to projects other than developments requiring development consent within the meaning of the Planning and Development Acts. Furthermore, a development which comes within 'exempted development' must nevertheless be subject to consent under the Planning and Development Acts where appropriate assessment under Article 6(3) of the Habitats Directive is required.

10 Regulation 42 of the 2011 Regulations provides:

'1. A screening for Appropriate Assessment of a plan or project for which an application for consent is received, or which a public authority wishes to undertake or adopt, and which is not directly connected with or necessary to the

management of the site as a European Site, shall be carried out by the public authority to assess, in view of best scientific knowledge and in view of the conservation objectives of the site, if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site.

2. A public authority shall carry out a screening for Appropriate Assessment under paragraph (1) before consent for a plan or project is given, or a decision to undertake or adopt a plan or project is taken.

...

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

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

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

11 The main proceedings relate to the assessment of the effects that the laying of the cable connecting a wind farm to the electricity grid potentially has on two special areas of conservation under the European ecological network Natura 2000, one of which is that of the River Barrow and River Nore (Ireland). That river constitutes a habitat for the Irish subspecies of the freshwater pearl mussel (*margaritifera durrovensis*; 'the Nore pearl mussel'), which is included in Annex II to the Habitats Directive. The extant adult population of this pearl mussel is, according to the estimates mentioned by the referring court, as low as 300 individuals, having been as high as 20 000 individuals in 1991. The life span of each individual is said to be between 70 and 100 years, but the Nore pearl mussel is said not to have reproduced itself since 1970. According to the referring court, it is apparent from recent monitoring surveys that this species is threatened with

extinction, on account of the high level of sedimentation of the bed of the River Nore, to which the species is particularly vulnerable, sedimentation which inhibits the successful restocking of the river by juveniles.

12 The consent required for developing the wind farm at issue in the main proceedings, with the exception of its connection to the grid, was dealt with in previous procedures. The consent granted by An Bord Pleanála in 2013 was subject to various conditions. Thus, according to condition 17 of that planning permission, 'the construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall provide details of intended construction practice for the development, including ... (k) means to ensure that surface water run-off is controlled such that no silt or other pollutants enter watercourses ...'.

13 Following the grant of that permission, the developer addressed the question of connecting the wind farm concerned to the electricity grid by means of a cable. The dispute in the main proceedings concerns that connection.

14 The applicants in the main proceedings submit that river pollutants resulting from the laying of the connection cable, such as silt and sediment, will have a harmful effect on the Nore pearl mussel.

15 Coillte contends that the cable laying at issue in the main proceedings is 'exempted development' not requiring consent, within the meaning of the applicable national planning legislation. However, it accepts that, if the project were to require appropriate assessment of the environmental implications, planning permission would have to be obtained from the local planning authority.

16 In order to determine whether it was necessary to carry out such appropriate assessment, Coillte instructed consultants to conduct the examination ('screening').

17 The screening report drawn up by those consultants concluded, inter alia, as follows:

'(a) In the absence of protective measures, there is potential for the release of suspended solids into waterbodies along the proposed route, including directional drilling locations.

(b) With regards to [the Nore pearl mussel], if the construction of the proposed cable works was to result in the release of silt or pollutants such as concrete into the pearl mussel population area of river through the pathway of smaller streams or rivers, there would be a negative impact on the pearl mussel population. Sedimentation of gravels can prevent sufficient water flow through the gravels, starving juvenile [Nore pearl mussels] of oxygen.'

18 It is apparent from the file before the Court that 'protective measures' were also analysed by that report.

19 Subsequently, on the basis of that report, the following recommendation was drawn up for Coillte by the 'programme manager':

'As set out in detail in the … appropriate assessment screening report, on the basis of the findings of that report and in light of the best scientific knowledge, the grid connection works will not have a significant effect on the relevant European sites in light of the conservation objectives of the European sites, alone or in combination with the Cullenagh wind farm and other plans or projects, and an appropriate assessment is not required. This conclusion was reached on the basis of the distance between the proposed Cullenagh grid connection and the European sites, and the protective measures that have been built into the works design of the project.'

20 Adopting the above reasons and recommendation, Coillte, as a public authority referred to in Regulation 42 of the 2011 Regulations, determined that no appropriate assessment, within the meaning of Article 6(3) of the Habitats Directive, was required in this instance.

21 The referring court considers that the decision that appropriate assessment was not required is based on the 'protective measures' referred to in the screening report. That court makes clear that the protective measures proposed and taken into account by the authors of that report are not as stringent as those required in condition 17(k) of the planning permission for the wind farm concerned.

22 In the light of the foregoing, the High Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under Article 6(3) of the Habitats Directive?'

Consideration of the question referred

23 First of all, it should be noted that Article 6 of the Habitats Directive imposes upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of the directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation (judgments of 11 April 2013, *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 36 and the case-law cited, and of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 31).

24 According to the Court's case-law, the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species, whilst Article 6(4) merely derogates from the second sentence of Article 6(3) (see, to that effect, judgment of 14 January 2016, *Grüne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 52 and the case-law cited).

25 Thus, Article 6 of the Habitats Directive divides measures into three categories, namely conservation measures, preventive measures and compensatory measures, provided for in Article 6(1), (2) and (4) respectively. It is clear from the wording of Article 6 of the Habitats Directive that that provision contains no reference to any concept of 'mitigating measure' (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 57 and 58 and the case-law cited).

26 It follows that, as is apparent from the reasoning of the request for a preliminary ruling, that the measures which the referring court describes as 'mitigating measures', and which Coillte refers to as 'protective measures', should be understood as denoting measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned.

27 Thus, by its question, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether or not it is necessary to carry out subsequently an appropriate assessment of a project's implications for a site concerned, it is possible, at the screening stage, to take account of the measures intended to avoid or reduce the project's harmful effects on that site.

28 The 10th recital of the Habitats Directive states that an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future. That recital finds expression in Article 6(3) of the directive, which provides inter alia that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications for that site (judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 22).

29 As the Court has pointed out, Article 6(3) of the Habitats Directive refers to two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site. The second stage, which is envisaged in the second sentence of Article 6(3) and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised only if it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4) of the directive (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 44 and 46 and the case-law cited).

30 It should be added that Article 6(3) of the Habitats Directive also integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites, resulting from the plans or projects envisaged. A less stringent authorisation criterion than that set out in that provision could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (judgment of 26 April 2017, *Commission* v *Germany*, C-142/16, EU:C:2017:301, paragraph 40 and the case-law cited).

31 In the present instance, as the parties to the main proceedings and the Commission agree, the uncertainty of the referring court concerns only the screening stage. More specifically, the referring court asks whether measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned can be taken into consideration at the screening stage, in order to determine whether it is necessary to carry out an appropriate assessment of the implications, for the site, of that plan or project.

32 Article 6(3) of the Habitats Directive sets out clearly that the obligation to carry out an assessment is dependent on both of the following conditions being met: the plan or project in question must not be connected with or necessary to the

management of the site, and it must be likely to have a significant effect on the site.

33 It is apparent from the file before the Court that the referring court considers the first of those conditions to be met.

34 As regards the second condition, it is settled case-law that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that the plan or project in question will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (judgment of 26 May 2011, *Commission* v *Belgium*, C-538/09, EU:C:2011:349, paragraph 39 and the case-law cited). The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 45 and the case-law cited).

35 As the applicants in the main proceedings and the Commission submit, the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.

36 That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

37 Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive.

38 In that regard, the Court’s case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed

works on the protected site concerned (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 50 and the case-law cited).

39 It is, moreover, from Article 6(3) of the Habitats Directive that persons such as the applicants in the main proceedings derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment (see, to that effect, judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 49).

40 In the light of all the foregoing considerations, the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.

Costs

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

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

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

harmful effects of the plan or project on that site.

Rosas Toader Jarašiūnas

Delivered in open court in Luxembourg on 12 April 2018.

A. Calot Escobar A. Rosas

Registrar President of the Seventh Chamber

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* Language of the case: English.