



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

25 July 2018\*

(Reference for a preliminary ruling — Environment — Directive 92/43/EC — Conservation of natural habitats and of wild fauna and flora — Article 6(3) and (4) — Assessment of the implications of a plan or project for a protected site — Plan or project not directly connected with or necessary to the management of the site — Wind farm project — Directive 2009/147/EC — Conservation of wild birds — Article 4 — Special Protection Area (SPA) — Annex I — Hen harrier (*Circus cyaneus*) — Suitable habitat fluctuating over time — Temporary or permanent reduction of the amount of appropriate land — Measures included in the project to ensure that, during the lifetime of the project, the amount of land that is in fact suitable for hosting the natural habitat of the species will not be reduced and indeed may be enhanced)

In Case C-164/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 20 March 2017, received at the Court on 3 April 2017, in the proceedings

**Edel Grace,**

**Peter Sweetman**

v

**An Bord Pleanála,**

intervening parties:

**ESB Wind Developments Ltd,**

**Coillte,**

**The Department of Arts Heritage and the Gaeltacht,**

THE COURT (Second Chamber),

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

Advocate General: E. Tanchev,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 1 February 2018,

\* Language of the case: English.

after considering the observations submitted on behalf of:

- Ms Grace and Mr Sweetman, by O. Collins, Barrister, and J. Devlin, Senior Counsel, instructed by O. Clarke and A. O’Connell, Solicitors,
- the An Bord Pleanála, by F. Valentine, Barrister, and N. Butler, Senior Counsel, instructed by A. Doyle and B. Slattery, Solicitors,
- ESB Wind Developments Ltd and Coillte, by R. Mulcahy, D. McDonald, Senior Counsel, and A. Carroll, Barrister-at-Law, instructed by D. Spence, Solicitor,
- the Netherlands Government, by M. Bulterman and C.S. Schillemans, acting as Agents,
- the European Commission, by E. Manhaeve and C. Hermes, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 April 2018,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 6(3) and (4) 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 Ms Edel Grace and Mr Peter Sweetman, the applicants, and the An Bord Pleanála (National Planning Appeals Board, Ireland) (‘the An Bord’) concerning the latter’s decision granting ESB Wind Developments Ltd and Coillte permission for a wind farm project in a special protection area which is classified as it hosts the natural habitat of a protected species.

### **Legal context**

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

##### *The Birds Directive*

- 3 Article 1(1) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7) (‘the Birds Directive’) states that the directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the FEU Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.
- 4 Article 4 of that directive provides as follows:  
  
‘1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

- (a) species in danger of extinction;

- (b) species vulnerable to specific changes in their habitat;
- (c) species considered rare because of small populations or restricted local distribution;
- (d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

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

...

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

- 5 The species mentioned in Annex I to the directive include the hen harrier (*Circus cyaneus*).

#### *The Habitats Directive*

- 6 The 10th recital of the Habitats Directive states as follows:

'Whereas 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.'

- 7 Article 2 of that directive provides as follows:

'1. The aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the [FEU] 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.'

- 8 Article 6 of the Habitats Directive states as follows:

'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 should 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.'

- 9 Pursuant to Article 7 of the Habitats Directive, obligations arising under Article 6(2) to (4) of the directive are applicable to special protection areas ('SPAs') within the meaning of the Birds Directive.

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

- 10 The dispute in the main proceedings concerns a plan to build a wind farm, which will be developed and operated jointly by Coillte, a public forestry undertaking, and ESB Wind Developments, and located in the SPA that stretches from Slieve Felim to Silvermines Mountains (in the counties of Limerick and Tipperary, Ireland, respectively) ('the contested development').
- 11 That territory has been classified as an SPA for the purposes of the fourth subparagraph of Article 4(1) of the Birds Directive because it hosts the natural habitat of a species of bird identified in Annex I to that directive, namely the hen harrier. That territory, which covers 20 935 hectares, includes, in particular, areas of unplanted blanket bog and heath and 12 078 hectares of woodland. Due to its characteristics, the whole of this area is potentially suitable as a habitat for that species.
- 12 According to the referring court, it is envisaged that the contested development will occupy 832 hectares of the SPA, essentially covered by first and second rotation plantations of conifers and unplanted bog and heath. The erection of 16 wind turbines and related infrastructure will require the clearance of trees at each wind turbine location. It is estimated that 41.7 hectares of trees will be felled. The development will result in the permanent loss of 9 hectares of habitat, corresponding to the built-on areas, and the temporary loss of 1.7 hectares of habitat, which will be used for the construction of temporary settlement ponds. Moreover, as it is assumed that foraging hen harriers will not come within 250 metres of a wind turbine, the referring court notes that this may result in the complete loss of 162.7 hectares of foraging habitat.
- 13 The contested development includes a Species and Habitat Management Plan ('the management plan'). That plan, to be implemented over a period of five years, includes measures to address the potential effects of the wind farm on the hen harrier's foraging habitat. First, the management plan envisages that three currently planted areas, covering an area of 41.2 hectares, 14.2 of which would be within 250 metres of a turbine, will be restored to blanket bog. Second, during the lifetime of the contested development, under the plan 137.3 hectares of second rotation forest will be subjected to 'sensitive' management, which foresees the felling and replacing of the current closed canopy forest so as to ensure that there will be 137.3 hectares of perpetually open canopy forest providing suitable foraging

habitat for the hen harrier and an ecological corridor between two areas of open bog. The felling will be done on a phased basis, starting a year prior to construction. Third, construction works will generally be confined to times outside the main hen harrier breeding season.

- 14 By decision of 22 July 2014, the An Bord decided to grant permission for the contested development on the ground that it would not adversely affect the integrity of the SPA.
- 15 Ms Grace and Mr Sweetman brought proceedings before the High Court (Ireland) contesting the An Bord's decision. By decisions of 1 October and 4 December 2015, that court rejected their application and upheld the An Bord's decision.
- 16 By decision of 26 February 2016, Ms Grace and Mr Sweetman were granted leave to appeal against that decision before the Supreme Court (Ireland). By judgment of 24 February 2017, that court gave final rulings on two of the three grounds of appeal. However, the final outcome of the appeal depends on the interpretation of Article 6(3) and (4) of the Habitats Directive.
- 17 According to Ms Grace and Mr Sweetman, the An Bord should have come to the conclusion that the contested development and its related management plan entailed compensatory measures and, accordingly, it should have taken account of the criteria laid down in Article 6(4) of Habitats Directive when carrying out its assessment.
- 18 The An Bord and the interveners in the main proceedings argue that, for the purpose of determining whether the development is likely to adversely affect the integrity of the SPA within the meaning of Article 6(3) of the Habitats Directive, it is necessary to take account of the fact that no part of the wooded sector of the area will remain permanently in a condition allowing it to provide suitable habitat.
- 19 In that connection, the Supreme Court indicates that hen harriers are primarily birds living in open countryside which require extensive areas of suitable land over which to forage. Nesting requirements are, however, small-scale and can be met in a smaller geographical area and a variety of habitat types. Moreover, the decline in the number of the protected species is attributable more to the potential deterioration of the foraging habitat than to that of the nesting habitat. The referring court states that, while unplanted bog and heath were once generally recognised as prime hen harrier habitat, it has been observed that, as commercial forestry has become more widespread, young conifer plantations on bog provide the hen harrier with foraging opportunities. On the other hand, it is apparent from those considerations that a forest which is not thinned or harvested, but is simply left to mature, resulting in a closed canopy, will not provide suitable foraging habitat.
- 20 It is apparent from the documents submitted to the Court that commercial forestry has an average cycle of 40 years, which includes two rotation stages. The parts of the area in which the plantations have matured at the end of the first stage and which therefore have a closed canopy are clear-felled. This is followed by a replanting stage, as a result of which part of the area will once again be open-canopy, providing suitable territory for hen harrier foraging. It follows that the foraging habitat of this species in the SPA is in constant flux and depends on which of those stages — which are linked to forest management — has been reached. Thus, a failure to actively manage the forest plantation would in itself lead to loss of hen harrier foraging habitat, as a result of the gradual disappearance of parts of the open canopy area. According to the available studies, the population of this protected species can be expected to fall and rise in accordance with the availability of open canopy forest. In the present case, the amount of open canopy forest will gradually decrease from 14% of the total afforested lands over the period 2014 to 2018 to a low of 8% during the period 2024 to 2028.

- 21 According to the referring court, it is required to determine whether the An Bord was incorrect to take the view that the contested development and the management plan entail mitigating elements which allow it to carry out its assessment solely on the basis of Article 6(3) of the Habitats Directive.
- 22 In that regard, the referring court is uncertain whether that provision is to be interpreted as meaning that the measures proposed in the management plan relating to the contested development which seek to ensure that the total area providing suitable habitat will not be reduced and could even be enhanced may, in the circumstances of the present case, be classified as mitigating measures, or whether they must be regarded as compensatory measures within the meaning of Article 6(4) of the Habitats Directive.
- 23 In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Where

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

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

### **Consideration of the question referred**

- 24 It should be noted, first, that, although the question referred by the Supreme Court does not contain any reference to provisions of EU law, that question, which must be read in the light of the details given in the order for reference, concerns the interpretation of Article 6(3) and (4) of the Habitats Directive.
- 25 Next, as regards the terms in which the question referred is couched, it should be added that Article 6 of the Habitats Directive does not contain any reference to ‘mitigating measures’ (judgments of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 57, and of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 25).
- 26 In this connection, the Court has previously observed that the effectiveness of the protective measures provided for in Article 6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called ‘mitigating’ measures’ — which are in reality compensatory measures — in order to circumvent the specific procedures laid down in Article 6(3) of the directive and authorise projects which adversely affect the integrity of the site concerned (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 58 and the case-law cited).



- 27 Lastly, with regard to areas classified as SPAs, obligations arising under Article 6(3) of the Habitats Directive replace, in accordance with Article 7 thereof, any obligations arising under the first sentence of Article 4(4) of the Birds Directive, as from the date of classification under the Birds Directive, where that date is later than the date of implementation of the Habitats Directive (judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 109 and the case-law cited).
- 28 It follows that the referring court's question is to be understood as asking, in essence, whether Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned, or whether that fact falls to be considered, if need be, under Article 6(4) of the directive.
- 29 Article 6 of the Habitats Directive imposes a set of specific obligations and procedures on Member States designed, as is apparent from Article 2(2) of the directive, to maintain or restore, as the case may be, at favourable conservation status, natural habitats and species of wild fauna and flora of European Union interest, with a view to attaining the directive's more general objective, which is to ensure a high level of environmental protection as regards the sites protected pursuant to the directive (see, to that effect, judgments of 8 November 2016, *Lesoochránárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 43, and of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 106).
- 30 In that regard, the provisions of Article 6 of the Habitats Directive constitute a coherent whole in the light of the conservation objectives laid down by the directive. Indeed, Article 6(2) and (3) is designed to ensure the same level of protection for natural habitats and habitats of species, whilst Article 6(4) merely derogates from the second sentence of Article 6(3) (judgment of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 24 and the case-law cited).
- 31 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 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 28 and the case-law cited).
- 32 Article 6(3) of the Habitats Directive refers to two stages. The first, envisaged in the provision's first sentence, requires 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 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 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 29 and the case-law cited).
- 33 It is in the light of those considerations that the question referred must be answered.

- 34 In the first place, it should be noted that, in order for the integrity of a site 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 favourable conservation status; this entails the lasting preservation of the site's constitutive characteristics that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of sites of Community importance, in accordance with the directive (see, to that effect, judgments of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 47 and the case-law cited, and of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 116).
- 35 In accordance with Article 4(1) of the Birds Directive, the designation of a territory as an SPA for the conservation of a species entails the lasting preservation of the constitutive characteristics of the habitat in that area, the survival of the species in question and its reproduction being the objective justifying the designation of that area.
- 36 In the main proceedings, it is common ground, as indicated by the referring court and as observed by the Advocate General in points 13 and 74 of his Opinion, that the conservation objective of the SPA is to maintain or restore favourable conservation conditions for the hen harrier. In particular, it is by providing the protected species with a habitat including a foraging area that the SPA enables that objective to be attained.
- 37 As regards, in the second place, the effects of the contested development on the SPA, the referring court states that the aim of the management plan is to put in place safeguards to ensure that, as regards the foraging habitat of the hen harrier, at any given time the area is not reduced and indeed may be enhanced, even though, during the lifetime of the contested development, some of the site will not have the potential to provide the hen harrier with appropriate habitat.
- 38 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 area 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 the area (see, to that effect, judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 108 and the case-law cited).
- 39 The assessment carried out under that provision 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 area concerned (see, to that effect, judgment of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 38 and the case-law cited).
- 40 The fact that the appropriate assessment of the implications of a plan or project for the area concerned must be carried out under that provision means that all the aspects of the plan or project which can, either by themselves or in combination with other plans or projects, affect the conservation objectives of that area must be identified in the light of the best scientific knowledge available in the field (see, to that effect, judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 113 and the case-law cited).
- 41 It is at the date of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the area in question (see, to that effect, judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 120 and the case-law cited).
- 42 In the present case, it is apparent from the order for reference, first, that the Supreme Court alludes to the permanent and direct loss of nine hectares of land hosting a suitable habitat for the hen harrier. Second, the felling of woodland for the construction of wind turbines and related infrastructure will



have the effect of removing 41.7 hectares of that habitat. Third, the part of the area that will not be available during the lifetime of the project could be as much as 162.7 hectares. Fourth, it should also be borne in mind that, during the development stage of the project, the area of open canopy forest, which is one of the constitutive characteristics of the foraging habitat of the protected species, will fall steadily.

- 43 The Court has previously ruled, in that regard, that where a plan or project not directly connected with or necessary to the management of an area may undermine the area's conservation objectives, it must be considered likely to have a significant effect on that area. The assessment of that risk must be made in the light, inter alia, of the characteristics and specific environmental conditions of the area concerned by such a plan or project (see, to that effect, judgments of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 20 and the case-law cited, and of 21 July 2016, *Orleans and Others*, C-387/15 et C-388/15, EU:C:2016:583, paragraph 45).
- 44 In the third place, the types of measures included in the contested development that form part of the management plan and are intended to address the effects of the development consist in, first, restoring areas of blanket bog and wet heath covering an area of 41.2 hectares (14.2 hectares of which will be within 250 metres of a wind turbine) and, second, providing areas of optimum habitat for hen harriers and other animals within the territory during the lifetime of the project, inter alia by felling and replacing the current closed canopy forest in that territory covering an area of 137.3 hectares in order to ensure that, ultimately, there is an open canopy area.
- 45 The referring court draws attention to a fact which, in its view, could be decisive for the purpose of the answer to be given to its question, in so far as it distinguishes the circumstances of the present case from those of the cases which gave rise to the judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330) and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583).
- 46 Accordingly, the SPA will be managed 'dynamically' in order to preserve the hen harrier's natural habitat, in the sense that the areas suitable for that habitat will vary geographically and over time, according to how the SPA is managed.
- 47 In that regard, as the Advocate General observed in point 58 of his Opinion, it follows from Article 6(3) and (4) of the Habitats Directive and the Court's related case-law that there is a distinction to be drawn between protective measures forming part of a project and intended avoid or reduce any direct adverse effects that may be caused by the project in order to ensure that the project does not adversely affect the integrity of the area, which are covered by Article 6(3), and measures which, in accordance with Article 6(4), are aimed at compensating for the negative effects of the project on a protected area and cannot be taken into account in the assessment of the implications of the project (see, to that effect, judgments of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraphs 28 and 29; of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 48; and of 26 April 2017, *Commission v Germany*, C-142/16, EU:C:2017:301, paragraphs 34 and 71).
- 48 In the present case, it is apparent from the findings of the referring court that some parts of the SPA would no longer be able, if the project went ahead, to provide a suitable habitat but that a management plan would seek to ensure that a part of the SPA that could provide suitable habitat is not reduced and indeed may be enhanced.
- 49 Accordingly, as the Advocate General observed in paragraph 71 et seq. of his Opinion, while the circumstances of the main proceedings are different from those of the cases which gave rise to the judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583), those cases are similar in that they are based, at the time the assessment of the implications of the plan or project for the area concerned, on the same

premiss that there will be future benefits which will address the effects of the wind farm on that area, even though those benefits are, moreover, uncertain. The lessons to be drawn from those judgments may therefore be transposed to a set of circumstances such as those of the main proceedings.

- 50 In that regard, the Court has previously ruled that the measures provided for in a project which are aimed at compensating for the negative effects of the project cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3) of the Habitats Directive (judgments of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 29, and of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 48).
- 51 It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out (see, to that effect, judgment of 26 April 2017, *Commission v Germany*, C-142/16, EU:C:2017:301, paragraph 38).
- 52 As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 52 and 56 and the case-law cited).
- 53 It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires ‘dynamic’ management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development.
- 54 The foregoing considerations are confirmed by the fact that 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 areas as a result of the plans or projects being considered (see, to that effect, judgment of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 26 and the case-law cited).
- 55 Lastly, it should be noted that, in accordance with Article 6(4) of the Habitats Directive, in the event that, in spite of the fact that the assessment conducted in accordance with the first sentence of Article 6(3) of that directive is negative, 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 where there are no alternative solutions, the Member State concerned is to take all compensatory measures necessary to ensure that ‘the overall coherence of Natura 2000’ is protected.
- 56 Therefore, in such a situation, the competent national authorities may grant an authorisation under Article 6(4) of the Habitats Directive only in so far as the conditions set out therein are satisfied (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 63 and the case-law cited).
- 57 It follows that the answer to the question referred is that Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will

be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.

### Costs

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

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

**Article 6 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, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.**

Ilešič

Rosas

Toader

Prechal

Jarašiūnas

Delivered in open court in Luxembourg on 25 July 2018.

A. Calot Escobar  
Registrar

M. Ilešič  
President of the Second Chamber