Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 January 2023 [1]

**Case C-721/21**

**Eco Advocacy CLG**

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

(Request for a preliminary ruling – Procedural autonomy of the Member States – Principle of effectiveness – Requirements governing written pleadings before the national court – Environment – Directive 2011/92/EU – Environmental impact assessment – Screening of the need for an assessment – Statement of reasons – Directive 92/43/EEC – Article 6(3) – Appropriate assessment – Screening of the need for an assessment – Mitigation measures – Dispelling of doubts)

## I. Introduction

1. EU law requires a number of assessments of the environmental effects of certain plans and projects. The environmental impact assessment under the EIA Directive [2] and the appropriate [3] assessment under the Habitats Directive [4] are probably the best known examples of these.

2. The present request for a preliminary ruling is primarily concerned with certain formal requirements governing the *screening* exercise to determine whether the aforementioned assessments are necessary at all. The issue, in the case of both directives, is whether the reasons for the decision not to carry out the assessment itself must be expressly indicated, and whether, in the case of the environmental impact assessment, that statement of reasons must expressly list all of the criteria to be taken into account under the EIA Directive. As regards screening under the Habitats Directive, it must also be considered whether certain mitigation measures may be taken into account and whether the statement of reasons for a decision not to carry out an appropriate assessment must rebut certain objections.

1 Original language: German.

2 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), as amended by Directive 2014/52/EU of 16 April 2014 (OJ 2014 L 124, p. 1).

3 Judgment of 10 November 2022, *AquaPri* (C-278/21, EU:C:2022:864, paragraph 32). This qualifier of the assessment of implications, although absent in the German version of Article 6(3) of the Habitats Directive, is present in the tenth recital thereof. On the basis of the English version, the term 'appropriate assessment' is often used.

4 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of Croatia (OJ 2013 L 158, p. 193).

3. In addition, it falls to the Court to rule on the requirements that must be applied to the applicants' pleadings before the national court. The issue here is similar to that in relation to the statement of reasons for the decision at the screening stage, which is to say whether the applicants have themselves failed to put forward with sufficient clarity the plea alleging that that statement of reasons is not sufficiently clear.

4. I shall submit below that the requirements of EU law on judicial pleadings and the formal framework for the statement of reasons are very limited. It is in essence for the Member States to lay down the rules governing such matters and for the national courts to assess the respective pleadings of the parties and the relevant information contained in the contested decision.

## II. Legal framework

### *A. EIA Directive*

5. Article 4 of the EIA Directive lays down how to decide whether an environmental impact assessment is to be carried out:

'2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).

3. Where a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account. Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an environmental impact assessment, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5.

4. …

5. The competent authority shall make its determination, on the basis of the information provided by the developer in accordance with paragraph 4 taking into account, where relevant, the results of preliminary verifications or assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive. The determination shall be made available to the public and:

(a) where it is decided that an environmental impact assessment is required, state the main reasons for requiring such assessment with reference to the relevant criteria listed in Annex III; or

(b) where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.'

6. Annex III to the EIA Directive contains the selection criteria for the decision to be made under Article 4(3):

'1. Characteristics of projects

The characteristics of projects must be considered, with particular regard to:

(a) the size and design of the whole project;

(b) cumulation with other existing and/or approved projects;

(c) the use of natural resources, in particular land, soil, water and biodiversity;

(d) the production of waste;

(e) pollution and nuisances;

(f) the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge;

(g) the risks to human health (for example due to water contamination or air pollution).

2. Location of projects

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to:

(a) the existing and approved land use;

(b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas:

(i) wetlands, riparian areas, river mouths;

(ii) coastal zones and the marine environment;

(iii) mountain and forest areas;

(iv) nature reserves and parks;

(v) areas classified or protected under national legislation; Natura 2000 areas designated by Member States pursuant to [the Habitats Directive] and [the Birds Directive [5]];

(vi) areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation and relevant to the project, or in which it is considered that there is such a failure;

(vii) densely populated areas;

(viii) landscapes and sites of historical, cultural or archaeological significance.

3. Type and characteristics of the potential impact

The likely significant effects of projects on the environment must be considered in relation to criteria set out in points 1 and 2 of this Annex, with regard to the impact of the project on the factors specified in Article 3(1), taking into account:

(a) the magnitude and spatial extent of the impact (for example geographical area and size of the population likely to be affected);

(b) the nature of the impact;

(c) the transboundary nature of the impact;

(d) the intensity and complexity of the impact;

(e) the probability of the impact;

(f) the expected onset, duration, frequency and reversibility of the impact;

(g) the cumulation of the impact with the impact of other existing and/or approved projects;

(h) the possibility of effectively reducing the impact.'

### *B. Habitats Directive*

7. Article 6(3) of the Habitats Directive governs the so-called 'appropriate assessment' of the implications of a plan or project:

'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'.

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

## III. Facts and request for a preliminary ruling

8. The action is directed at the judicial review of the validity of a permission which was granted by An Bord Pleanála (Irish planning authority, 'the Board') for a housing development in Trim, County Meath. The proposal is for the construction of 320 dwellings at Charterschool Land, Manorlands.

9. Following a number of informal contacts, the formal planning application for this development was submitted on 8 July 2020. The design provides for certain provisions to be made for surface water run-off to be treated before being discharged into a stream that is a tributary of the River Boyne.

10. The Boyne itself is approximately 640 metres to the north of the development. It is part of the 'River Boyne and River Blackwater Special Protection Area' (IE0004232) under the Birds Directive, for which a qualifying interest is the kingfisher (*Alcedo atthis*) [A229]. The site falls within the 'River Boyne and River Blackwater Special Area of Conservation' (IE0002299) under the Habitats Directive. The habitat types alkaline fens [7230], alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-padion*, *Alnion incanae*, *Salicion albae*) [91E0] and the animal species *Lampetra fluviatilis* (river lamprey) [1099], *Salmo salar* (salmon) [1106] and *Lutra lutra* (otter) [1355] are further qualifying interests.

11. A screening report on the need for an environmental impact assessment and an ecological impact assessment, which together contained a number of proposed mitigation measures, were prepared. A screening report under the Habitats Directive, which concluded that there would be no impact on Natura 2000 sites, was also submitted.

12. An Taisce (National Trust for Ireland, a statutory planning consultee) and Trim Town Council made submissions noting the potential impact on Natura 2000 sites as a result of the discharge of surface water run-off. The Council also expressed concerns about the protection of species.

13. The Board nonetheless granted the contested permission without carrying out an environmental impact assessment under the EIA Directive or an appropriate assessment under the Habitats Directive.

14. The template used by the Board's inspector in Annex A of her report uses a format for EIA screening which differs in material respects from Annex III to the EIA Directive. In the view of the High Court (Ireland) the correspondence between Annex III and the inspector's report seems unclear. The inspector also addresses the concerns regarding the impact on Natura 2000 sites, but concludes that these are unfounded.

15. On 27 October 2020, permission was formally granted by decision of the Board under the strategic housing development procedure. The Board did not spell out exactly which documents contained the reasoning for the purposes of an environmental impact assessment under the EIA Directive and an appropriate assessment under the Habitats Directive. According to the High Court, it seems to have been the intention that the reasoning is contained in Annex A to the inspector's report and in the reports submitted by the developer where referred to by the inspector.

16. Eco Advocacy brought an action against that permission before the High Court.

17. It follows from an initial judgment given by the High Court that Eco Advocacy raised the two grounds of challenge forming the subject of the second, third and sixth questions for the first time at the hearing.[6] Subsequently, An Taisce and ClientEarth were joined to the proceedings as *amici curiae*.

18. By an order received here on 26 November 2021, the High Court referred the following questions to the Court of Justice:

'(1) Does the general principle of the primacy of EU law and/or of cooperation in good faith have the effect that, either generally or in the specific context of environmental law, where a party brings proceedings challenging the validity of an administrative measure by reference, expressly or impliedly, to a particular instrument of EU law, but does not specify which provisions of the instrument have been infringed or by reference to which precise information the domestic court before which proceedings are brought must, or may, examine the complaint, notwithstanding any rule of domestic procedure requiring the specific breaches concerned to be set out in the party's written pleadings?

(2) If the answer to the first question is "Yes", whether Article 4(2), (3), (4) and/or (5) and/or Annex III [to] the EIA Directive … and/or the directive read in the light of the principle of legal certainty and good administration under Article 41 of the Charter of Fundamental Rights of the European Union have the consequence that, where a competent authority decides not to subject a proposal for development consent to the process of environmental impact assessment, there should be an express, discrete and/or specific statement as to what documents exactly set out the reasons of the competent authority.

(3) If the answer to the first question is "Yes", whether Article 4(2), (3), (4) and/or (5) and/or Annex III [to] the EIA Directive … and/or the directive read in the light of the principle of legal certainty and good administration under Article 41 of the Charter of Fundamental Rights of the European Union have the consequence that, where a competent authority decides not to subject a proposal for development consent to the process of environmental impact assessment, there is an obligation to expressly set out consideration of all specific headings and sub-headings in Annex III [to] the EIA Directive, in so far as those headings and sub-headings are potentially relevant to the development.

(4) Whether Article 6(3) of [the Habitats Directive] is to be interpreted as meaning that, in the application of the principle 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 competent authority of a member state is entitled to take account of features of the plan or project involving the removal of contaminants that may have the effect of reducing harmful effects on the European site solely on the grounds that those features are not intended as mitigation measures even if they have that effect, and that they would have been incorporated in the design as standard features irrespective of any effect on the European site concerned.

[6] Judgment of the High Court of 27 May 2021, *Eco Advocacy* v *An Bord Pleanála* (2020 No. 1030 JR, [2021] IEHC 265, paragraphs 46, 48 and 86).

(5) Whether Article 6(3) of [the Habitats Directive] is to be interpreted as meaning that, where the competent authority of a member state is satisfied notwithstanding the questions or concerns expressed by expert bodies in holding at the screening stage that no appropriate assessment is required, the authority must give an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the works envisaged on the European site concerned, and that expressly and individually removes each of the doubts raised in that regard during the public participation process.

(6) If the answer to the first question is "Yes", whether Article 6(3) of the Habitats Directive … and/or the directive read in the light of the principle of legal certainty and good administration under Article 41 of the Charter of Fundamental Rights of the European Union has the consequence that, where a competent authority decides not to subject a proposal for development consent to the process of appropriate assessment, there should be an express, discrete and/or specific statement as to what documents exactly set out the reason of the competent authority.'

19. Written observations have been submitted by Eco Advocacy CLG, An Bord Pleanála, An Taisce – The National Trust for Ireland and ClientEarth, acting jointly, Ireland, the Italian Republic and the European Commission. With the exception of the Italian Republic, the aforementioned parties also attended the hearing on 27 October 2022.

## IV. Legal assessment

20. The High Court's questions concern, on the one hand, the permissibility of requirements governing the pleadings of parties claiming that EU law has been infringed (first question), and, on the other hand, the screening exercise to determine whether an environmental impact assessment under the EIA Directive (second and third questions) or an appropriate assessment of implications for special areas of conservation under Article 6(3) of the Habitats Directive (fourth to sixth questions) is to be carried out.

### *A. First question: requirements governing the presentation of an alleged infringement*

21. This question seeks to clarify the limits attaching under EU law to national requirements governing the form in which grounds of challenge are presented in judicial proceedings. It is clear from the question that, under Irish procedural law, parties' written pleadings must set out the specific infringements alleged. The applicants in the main proceedings, however, appear not to have specified under all of the grounds of challenge which provisions of the directive concerned have been infringed, to which precise interpretation reference is made or how that alleged infringement has been committed. The referring court therefore wishes to ascertain whether the general principles of the primacy of EU law and/or of cooperation in good faith, either generally or in the specific context of environmental law, confers on national courts a power or even a duty to examine such pleas in law notwithstanding that they are inadequately set out in writing.

*1. Admissibility of the question*

22. Italy considers this question to be inadmissible on the ground that the order for reference does not precisely set out the rules of national law which Eco Advocacy's pleadings should have satisfied in order to be admissible.

23. It must be conceded in regard to this objection that it would have been easier for the Court to provide a useful answer and for Italy to participate in these proceedings if those rules of national law and the relevant written and oral pleadings had been set out more precisely in the request for a preliminary ruling. Thus, in accordance with Article 94 of the Rules of Procedure of the Court of Justice, a request for a preliminary ruling must contain a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based, as well as the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law.

24. While it is true that that information could be gleaned from the documents in the national proceedings, and in particular from an earlier judgment of the High Court,[7] those materials are not communicated to the Member States and institutions of the European Union and are not translated either.

25. Notwithstanding those shortcomings, this question can still be answered, since, in preliminary ruling proceedings, the Court confines itself to interpreting EU law, but does not yet rule definitively on the dispute before the national court. For this reason, it is not appropriate to dismiss this question as inadmissible.

*2. Assessment*

26. The first question is intended to ascertain whether national procedural law may require claims of infringement of EU law to be set out clearly and precisely even at the stage of the written procedure. It thus asks, on the one hand, whether such requirements governing parties' pleadings are permissible, and, on the other hand, whether EU law entitles or even compels national courts to raise of their own motion a plea alleging such infringements irrespective of the timely submission of pleadings by the parties.

*(a) Requirements governing parties' pleadings*

27. In the first place, it follows from the general principle of the primacy of EU law and/or the principle of cooperation in good faith referred to by the High Court that national courts are under a duty to give full effect to the provisions of EU law.[8]

28. As I have already noted in previous Opinions,[9] it is, however, for the national legal system of each Member State to lay down the detailed procedural rules governing actions to enforce rights that derive from EU law (procedural autonomy of the Member States), at least in the absence of any relevant EU rules. In those circumstances, the detailed procedural rules governing such

[7] See point 17 above.

[8] Judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 24), and of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 44).

[9] My Opinions in *Impact* (C-268/06, EU:C:2008:2, points 45 and 46); *Križan and Others* (C-416/10, EU:C:2012:218, point 153); and *Flausch and Others* (C-280/18, EU:C:2019:449, points 47 and 48).

actions must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness). [10]

29. Article 11 of the EIA Directive contains specific rules on legal protection which are capable of restricting the procedural autonomy of the Member States in the present case. In accordance with Article 11(1), Member States must ensure, subject to certain conditions, that there is 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 that directive. The second subparagraph of Article 11(4) provides that any such procedure is to be fair, equitable, timely and not prohibitively expensive.

30. It is true that those provisions require that environmental associations in particular be guaranteed access to an effective and fair review procedure. This must include making it possible to challenge the lawfulness of the relevant decisions, acts or omissions, which is to say to raise certain grounds of challenge. Those provisions do not, however, prescribe how and at what point in time such grounds must be raised. This, therefore, is a matter which continues to fall within the procedural autonomy of the Member States.

31. There is nothing to indicate that the principle of equivalence is affected in the present case. Conversely, it is not inconceivable that requirements governing the precision of written pleadings may make it difficult or impossible to enforce rights through the courts. However, the principle of effectiveness is infringed only where enforcement through the courts is made *excessively* difficult or impossible *in practice*.

32. That examination must take into account the role of the provisions in question in the procedure, its conduct and its special features, viewed as a whole, before the various national instances. In that context, it is appropriate to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of proceedings. [11]

33. In that connection, the Court has already held that national procedural rules according to which the subject matter of the dispute is determined by the pleas in law put forward at the point in time at which the action was brought are consistent with the principle of effectiveness in so far as they ensure the proper conduct of proceedings by, in particular, protecting them from the delays inherent in the examination of new pleas. [12]

34. As Ireland rightly submits, such rules exist in the procedural law of the EU courts too. Thus, in accordance with Article 120(c) of the Rules of Procedure of the Court of Justice, an application must state the pleas in law and arguments relied on and a summary of those pleas in law. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence

[10] Judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188, paragraph 5); of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 44 and 46); and of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114, paragraph 33).

[11] Judgments of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437, paragraph 14); of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraphs 36 and 37); and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 63).

[12] Judgments of 14 December 1995, *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441, paragraphs 20 and 21), and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 64).

and the Court to rule on the application.[13] In accordance with Article 127(1), no new plea in law may be brought in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

35. It is therefore compatible with the principle of effectiveness for the procedural law of the national courts to require that parties' pleadings be presented in a timely and sufficiently clear and precise fashion in order to be taken into account.

36. What form of presentation is sufficiently clear and precise depends on the circumstances of the case. The decisive factor should be whether the parties and the court are able to understand the ground of challenge in question unequivocally. Only disproportionate formalism would have to be regarded as making matters excessively difficult and, for that reason, as being incompatible with the principle of effectiveness.

37. Furthermore, the requirements governing the presentation of grounds of challenge should also take into account the extent to which the conduct of the other parties has led to any shortcomings. In particular, the second, third, fifth and sixth questions indicate that, in the main proceedings, the Board presented the grounds of the contested permission in a form which might have contributed towards the weaknesses of Eco Advocacy's pleadings. If so, this would have to be properly taken into account in the requirements applied to Eco Advocacy's pleadings.

38. Whether particular pleadings of the parties satisfy those requirements is a matter for the competent national court to judge. That court must determine the content of the relevant national requirements by interpreting the rules concerned, and that court alone has the necessary knowledge to be able to assess what form of presentation is sufficiently clear and precise to be understood by the parties and the court itself. What is more, that court is able to determine from its own experience whether any shortcomings in the pleadings would lead to misunderstandings and to what extent those shortcomings are attributable to the conduct of the other parties.

39. In summary, it must be concluded that the procedural autonomy of the Member States, limited by the principle of effectiveness, allows the parties to a dispute to be required to set out infringements of EU law in a sufficiently clear and precise manner in their written pleadings at an early stage in those proceedings in order for such infringements to be taken into account by the national court.

*(b) Raising of pleas by the courts of their own motion*

40. The imposition of requirements in respect of pleadings submitted by parties before national courts, which, according to the foregoing submissions, is allowed, would be of limited effect, however, if EU law compelled or at least entitled those courts to raise of their own motion pleas alleging infringements of EU law that have been insufficiently set out.

41. The High Court nonetheless infers an obligation to that effect from the need to ensure the effectiveness of EU law. In this regard, An Taisce cites the case-law of the Court of Justice to the effect that national courts must disapply 'of their own motion' – to use the expression contained in the English versions of the judgments in question – provisions of national law which are contrary

[13] Judgments of 9 January 2003, *Italy* v *Commission* (C-178/00, EU:C:2003:7, paragraph 6), and of 31 March 2022, *Commission* v *Poland (Taxation of energy products)* (C-139/20, EU:C:2022:240, paragraph 55).

to EU law.[14] As founded on the English version of that case-law, that inference is understandable, given that 'of their own motion' can be translated [into German], inter alia, as 'von Amts wegen'. On that basis, that case-law could be understood to mean that national courts must disapply of their own motion national law which is incompatible with EU law.

42. That view, however, is based on a misunderstanding of the aforementioned case-law concerning the primacy of EU law. This becomes clearer in the French version of that expression, according to which the courts must act 'de leur propre autorité', as well as, for example, in the German version, which uses the phrase 'eigener Entscheidungsbefugnis'.[15]

43. As the context of its findings also makes clear, the Court of Justice is referring here to the power of the national courts to interpret national law in accordance with the requirements of EU law or, if necessary, to apply the overriding EU law, without having to wait until the national rules which are contrary to EU law are repealed or annulled.

44. As I have already stated, this does not require that the parties expressly set out in detail before the national courts which provisions of national law those courts should interpret in accordance with EU law or disapply. On the contrary, identifying those provisions and working out how to eliminate any inconsistency between national law and EU law is part and parcel of the national courts' obligation to achieve the objective envisaged by EU law.[16]

45. However, the question as to whether the national courts may or must raise of their own motion a plea alleging certain infringements of EU law is entirely unrelated.

46. Just as the primacy of EU law, the procedural provisions contained in Article 11 of the EIA Directive impose no stipulations in this regard. In particular, there is nothing in those provisions to indicate that they compel or empower national courts to extend their examination of the lawfulness of the contested decision beyond the grounds raised.

47. In this way, Article 11 of the EIA Directive differs from the rules that formed the subject matter of an earlier judgment concerning review of the detention of third-country nationals. Those provisions required the judicial authorities to conduct periodic reviews of the lawfulness of the detention, without in any way restricting that obligation.[17] The Court inferred from this that the competent judicial authority must raise of its own motion any failure to comply with a condition governing lawfulness which has not been invoked by the person concerned.[18] In the light of the serious interference with the fundamental right to liberty under Article 6 of the Charter that is attendant upon detention, that obligation is justified. In the field of the enforcement of EU environmental law, however, there are no comparable provisions, and, as a rule, no similarly serious interferences with the rights of individuals either.

[14] An Taisce relies on the judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 35). Similar forms of words can also be found, for example, in the judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 24), and of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 44). See also my Opinion in *Friends of the Irish Environment* (C-254/19, EU:C:2020:320, point 66).

[15] See the judgments cited in footnote 14.

[16] My Opinion in *Friends of the Irish Environment* (C-254/19, EU:C:2020:320, point 67).

[17] Judgment of 8 November 2022, *Staatssecretaris van Justitie en Veiligheid and X (Ex officio review of detention)* (C-704/20 and C-39/21, EU:C:2022:858, paragraphs 85 to 87).

[18] Judgment of 8 November 2022, *Staatssecretaris van Justitie en Veiligheid and X (Ex officio review of detention)* (C-704/20 and C-39/21, EU:C:2022:858, paragraph 94).

48. Consequently, the obligation or empowerment of national courts to examine certain grounds of challenge of their own motion must also be assessed by reference to the procedural autonomy of the Member States, which is limited by the principles of equivalence and effectiveness.

49. In this regard, it is settled case-law that EU law does not require national courts to raise of their own motion a plea alleging infringement of EU provisions where examination of that plea would oblige them to go beyond the ambit of the dispute as determined by the parties. Rather, national courts are obliged to raise of their own motion points of law based on binding EU rules only where, under national law, they must or may do so in relation to a binding rule of national law. [19]

50. It is true that, in derogation from the foregoing, the Court has held that national courts are required to assess of their own motion whether a contractual term falling within the scope of the directive on unfair terms in consumer contracts [20] is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task. [21] This, however, is a special case in which the particular need for consumer protection finds expression, inter alia, in the rule, laid down in Article 6(1) of that directive, that terms which are unfair to the consumer are not binding. [22] Thereafter, the Court extended that case-law to the enforcement of certain other rights which EU law confers on consumers. [23]

51. That case-law could potentially be transposed to EU environmental law in cases involving a risk of particularly serious infringements. [24] In the present case, however, there is nothing to indicate the presence of such a risk. There is therefore no need to discuss this point any further.

52. The question referred for a preliminary ruling also raises the possibility that EU law does not compel but at least entitles national courts to raise of their own motion pleas alleging infringements of EU environmental law. It remains unclear whether this question is relevant to the judgment to be given, since the Irish parties are unanimous in stating that Irish law already entitles the High Court to raise of its own motion pleas alleging such infringements in certain circumstances.

53. If this question is relevant to the judgment to be given, it too must be assessed against the criterion of the limits, set by the principles of equivalence and effectiveness, attaching to the procedural autonomy of the Member States.

[19] Judgments of 14 December 1995, *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441, paragraphs 13, 14 and 22); of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraphs 57, 58 and 60); of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78, paragraph 45); and of 26 April 2017, *Farkas* (C-564/15, EU:C:2017:302, paragraphs 32 and 35). See also my Opinion in *Friends of the Irish Environment* (C-254/19, EU:C:2020:320, point 60).

[20] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

[21] Judgments of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 26); of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 46); and of 17 May 2022, *SPV Project 1503 and Others* (C-693/19 and C-831/19, EU:C:2022:395, paragraph 53).

[22] Judgments of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 26); of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 45); and of 17 May 2022, *SPV Project 1503 and Others* (C-693/19 and C-831/19, EU:C:2022:395, paragraph 52).

[23] Judgments of 4 October 2007, *Rampion and Godard* (C-429/05, EU:C:2007:575, paragraph 65), and of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 66).

[24] My Opinion in *Križan and Others* (C-416/10, EU:C:2012:218, points 160 to 166).

54. Such entitlement might arise in particular from the principle of equivalence, if national law provides for that power in comparable cases. Although the aforementioned submission indicates that this is the case, there is ultimately insufficient information on Irish law to be able to provide a definitive answer to that question.

55. The principle of effectiveness, on the other hand, is capable at most of supporting an obligation on the part of national courts to raise of their own motion pleas alleging *certain* infringements, although there is nothing in the present case to indicate the existence of such an obligation. It is, after all, the rights conferred by EU law that constitute the point of reference for that principle. The enforcement of rights cannot be dependent on a power the exercise of which lies at the discretion of the courts.

56. Thus, EU law does not as a rule compel or entitle national courts to raise of their own motion pleas alleging infringements of environmental law.

*(c) Answer to the first question*

57. The answer to the first question must therefore be that the procedural autonomy of the Member States, limited by the principle of effectiveness, allows the parties to a dispute to be required to set out infringements of EU environmental law in a sufficiently clear and precise manner in their written pleadings at an early stage in those proceedings in order for such infringements to be taken into account by the national court. EU law does not as a rule compel or entitle the national court to raise of its own motion pleas alleging such infringements.

## *B. Questions on the environmental impact assessment*

58. The second and third questions relate to the screening exercise to determine whether a project is to be subject to an environmental impact assessment. It is true that these questions are raised only in the event of a positive answer to the first question. However, according to the considerations developed above in this regard, the national court will ultimately have to rule on the first question by reference to the interpretative guidance provided by the Court of Justice. It is therefore necessary to answer those questions.

59. In accordance with Article 2(1) of the EIA Directive, Member States are to adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects on the environment. This is known as an environmental impact assessment.

60. Article 4(1) of the EIA Directive provides that projects listed in Annex I are in principle always to be made subject to an environmental impact assessment. Article 4(2), by contrast, provides that, for some of the projects listed in Annex II, it must be determined through a case-by-case examination whether an environmental impact assessment is necessary. Article 4(3) states that the case-by-case examination must take into account the relevant selection criteria set out in Annex III. It is this screening stage with which these questions are concerned.

61. The Court has held in this regard that an environmental impact assessment must be carried out where there is a probability or a risk that the project in question will have significant effects on the environment. In the light, in particular, of the precautionary principle, which is one of the

foundations of the high level of protection pursued by EU policy on the environment, in accordance with Article 191(2) TFEU, and by reference to which the EIA Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective circumstances that the project in question will have significant effects on the environment.[25] This is consistent with the decision-making practice[26] of the Implementation Committee of the Espoo Convention,[27] which is transposed into EU law by the EIA Directive.[28]

62. It is against the foregoing background that I shall answer first the third and then the second questions.

*1. Third question: scope of the statement of reasons for the decision not to carry out an environmental impact assessment*

63. By the third question, the High Court seeks to clarify the requirements governing the comprehensibility of the statement of reasons. In particular, it wishes to ascertain whether the authority must expressly set out consideration of all specific headings and sub-headings in Annex III of the EIA Directive, in so far as those headings and sub-headings are potentially relevant to the project.

64. In accordance with Article 4(5)(b) of the EIA Directive, the competent authority's determination must state the main reasons for not requiring an environmental impact assessment with reference to the relevant criteria listed in Annex III. The criteria listed in Annex III to the EIA Directive concern certain characteristics of the project in question, characteristics of the location and the type and characteristics of the potential impact.

65. The statement of reasons will satisfy those requirements only if, in respect of each individual criterion listed in Annex III to the EIA Directive, it rules out by reference to objective circumstances the possibility that the project in question will have significant effects. In the case of some criteria, that conclusion may be obvious, in which event a brief reference may suffice. Indeed, it may be that one such brief reference will cover all such criteria collectively. In other cases, further information may be necessary.[29]

66. The EIA Directive does not contain any rules on the form that the statement of reasons should take in relation to the above points. In particular, it does not require the statement of reasons to follow the structure of Annex III. The statement of reasons must, however, make it sufficiently clear that the project will not have significant effects on the environment. Should it fail to do so in relation to certain criteria listed in Annex III, it cannot justify a decision not to carry out an environmental impact assessment.

[25] Judgment of 31 May 2018, *Commission* v *Poland* (C-526/16, not published, EU:C:2018:356, paragraphs 66 and 67), and the Opinion of Advocate General Collins in *Wertinvest Hotelbetrieb* (C-575/21, EU:C:2022:930, point 47) which relies on the settled case-law concerning the Habitats Directive, in particular the judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraphs 43 and 44).

[26] Economic Commission for Europe, Opinions of the Implementation Committee (2001–2020) (2020), point 25. See also the 'Findings and recommendations further to a submission by Romania regarding Ukraine' (EIA/IC/S/1, Bystroe Canal Project) of 27 February 2008 (ECE/MP.EIA/2008/6, point 49).

[27] 1991 Convention on Environmental Impact Assessment in a Transboundary Context (OJ 1992 C 104, p. 7).

[28] See in that regard my Opinion in *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2018:972, points 69 to 74 and 105 et seq.).

[29] See, similarly, the judgment of 7 November 2018, *Holohan and Others* (C-461/17, EU:C:2018:883, paragraphs 37 to 39), as regards the appropriate assessment under the Habitats Directive.

67. Thus, in accordance with Article 4(5)(b) of the EIA Directive, the statement of reasons for a decision not to carry out an environmental impact assessment must, on the basis of objective circumstances and with reference to the relevant criteria listed in Annex III, rule out the probability or the risk that the project concerned will have significant effects on the environment.

*2. Second question: specific identification of the statement of reasons for the decision not to carry out an environmental impact assessment*

68. The second question seeks to ascertain to what extent the decision not to carry out an environmental impact assessment must specifically state the documents in which the reasons for that decision are to be found.

69. The background to this question is that, in the main proceedings, Eco Advocacy had complained that the Board's decision was not reasoned, without realising that the statement of reasons was to be found in an annex to that decision.

70. As I have already said, Article 4(5)(b) of the EIA Directive provides that the decision not to call for an environmental impact assessment must contain a statement of reasons. In that provision, the legislature gave expression to the obligation to state reasons that is concomitant with the opportunity that must be made available to challenge that decision effectively. [30] While the Court previously considered it sufficient for that statement of reasons to be given either in the decision itself or subsequently on request, [31] it is now the case that it must form part of the decision.

71. Article 4(5) of the EIA Directive does not, however, require the competent authority to state expressly, discretely and/or specifically in which documents exactly its reasons are set out. Neither is there any indication of such a requirement in connection with Article 6 of the Aarhus Convention, [32] which was transposed by the EIA Directive. [33]

72. The competent authority or the Member State therefore retains a measure of discretion when it comes to presenting the reasons for its decision. [34] This question too is thus subject to the procedural autonomy which must be exercised within the limits set by the principles of equivalence and effectiveness. [35]

73. It would hardly be compatible with the principle of effectiveness, however, if the statement of reasons were concealed or misleading, [36] for, in that event, the enforcement of any rights in connection with the decision not to carry out an environmental impact assessment would become unnecessarily and, therefore, excessively difficult. The statement of reasons must, rather, be recognisable as such and indicate in a manner that is comprehensible from the point of view of its content the information forming the basis of the decision in question.

30 Judgment of 30 April 2009, *Mellor* (C-75/08, EU:C:2009:279, paragraphs 57 to 59).

31 Judgment of 30 April 2009, *Mellor* (C-75/08, EU:C:2009:279, paragraph 59).

32 1998 Convention on access to information, public participation in decision making and access to justice in environmental matters (OJ 2005 L 124, p. 4), adopted by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

33 Recitals 18 to 21 of the EIA Directive and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

34 See also the findings and recommendations of the Aarhus Convention Compliance Committee of 7 March 2009, Association Kazokiskes Community (Lithuania) (ACCC/C/2006/16, ECE/MP.PP/2008/5/Add.6, point 81). With regard to that committee, see finally my Opinion in *FCC Česká republika* (C-43/21, EU:C:2022:64, footnote 16, with further references).

35 See to that effect the judgment of 7 November 2019, *Flausch and Others* (C-280/18, EU:C:2019:928, paragraph 27).

36 See, by way of illustration, the judgment of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraph 87).

74. In accordance with Article 4(5)(b) of the EIA Directive and the principle of effectiveness, therefore, the statement of reasons for a decision not to carry out an environmental impact assessment must ensure that the reasons are recognisable as such and comprehensible from the point of view of their content. Whether a statement of reasons satisfies those requirements is a matter for consideration by the national court, which has the information necessary to assess whether the public in the Member State concerned was able to recognise the reasons as such and understand them.

### *C. Questions concerning the Habitats Directive*

75. The fourth to sixth questions relate to the screening exercise to determine whether an appropriate assessment of implications under Article 6(3) of the Habitats Directive is to be carried out.

76. While the general environmental impact assessment is not directly linked to the conditions governing development consent,[37] the appropriate assessment under Article 6(3) of the Habitats Directive is intended as preparation for the approval of a plan or project. In accordance with the second sentence of paragraph 3, the competent national authorities are to agree to the plan or project, in the light of the conclusions of the appropriate assessment and subject to the provisions of paragraph 4, 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.

77. Such approval can be granted only if no reasonable scientific doubt exists that the plan or project will not adversely affect the integrity of the site concerned.[38] An appropriate assessment must therefore contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of a project with the potential to affect the protected site concerned.[39]

78. That function of the appropriate assessment shapes the requirements governing the screening exercise to determine whether such an assessment must be carried out.

79. In accordance with the first sentence of Article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for a protected site in view of that site's conservation objectives is necessary where the plan or project in question is likely to have a significant effect, either individually or in combination with other plans or projects, on a special area of conservation within the meaning of that directive.

80. In interpreting that provision, the Court has developed the criterion for assessment, which it later transferred to the general environmental impact assessment,[40] whereby the obligation to carry out an assessment exists where there is a probability or a risk that a plan or project will

[37] Judgments of 13 December 2007, *Commission* v *Ireland* (C-418/04, EU:C:2007:780, paragraph 231), and of 14 March 2013, *Leth* (C-420/11, EU:C:2013:166, paragraph 46).

[38] Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 59); of 17 April 2018, *Commission* v *Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 117); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 120).

[39] Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 44); of 17 April 2018, *Commission* v *Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 114); and of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:680, paragraph 55).

[40] See point 61 above.

have a significant effect on the site in question.[41] And here too, it is the case that, regard being had to the precautionary principle, in particular, such a risk is deemed to be present where it cannot be ruled out, on the basis of objective circumstances, that the plan or project concerned will have a significant effect on the conservation objectives for the site in question.[42] The assessment of that risk must be made in the light of the characteristics and specific environmental conditions of the site concerned by such a plan or project.[43] It follows that if, after that screening exercise, doubts remain as to the absence of any significant effects, the full assessment of implications provided for in the first sentence of Article 6(3) of the Habitats Directive must be carried out.[44] A full assessment is therefore the rule, and this may be derogated from only where any doubt as to the need for such an assessment has been ruled out.

81. In the light of those considerations, I shall now answer the fourth to sixth questions in reverse order.

### *1. Sixth question: specific identification of the statement of reasons for the decision not to carry out an appropriate assessment under Article 6(3) of the Habitats Directive*

82. The sixth question repeats the second question as regards the statement of reasons for a decision not to carry out an appropriate assessment under Article 6(3) of the Habitats Directive. Here too it falls to be determined to what extent there must be a specific indication of the documents in which the reasons for that decision are to be found. Although this question too is raised only in the event that the first question is answered in the positive, it nonetheless requires an answer, since the national court alone is able to decide whether the answer to the first question is positive or negative in the main proceedings.

83. Unlike the EIA Directive, the Habitats Directive does not expressly govern the statement of reasons for a decision not to carry out an appropriate assessment.

84. However, as in the context of the general environmental impact assessment,[45] the effective judicial review of that decision and the right to effective legal protection presuppose that the court to which the matter is referred and those seeking redress will have access to the statement of reasons for the contested decision, either in the decision or on request.[46] Moreover, that obligation to state reasons reflects the right to good administration which the national authorities must observe when implementing EU law, not on the basis of Article 41 of the

41 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraphs 41 and 43); of 17 April 2018, *Commission* v *Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 111); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 119).

42 Judgments of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 134), and of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:680, paragraph 51). On the EIA Directive, see point 61 above.

43 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 48); of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 134); and of 17 April 2018, *Commission* v *Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 112).

44 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 44); of 26 May 2011, *Commission* v *Belgium* (C-538/09, EU:C:2011:349, paragraph 41); and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraph 114).

45 See point 70 above.

46 See to this effect the judgments of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 15), and of 30 April 2009, *Mellor* (C-75/08, EU:C:2009:279, paragraph 59). See also my Opinion in *Holohan and Others* (C-461/17, EU:C:2018:649, point 65).

Charter,[47] but on the basis of a general principle of law.[48] In the case of decisions under environmental law which – like the appropriate assessment under Article 6(3) of the Habitats Directive[49] – require public participation in accordance with Article 6 of the Aarhus Convention, Article 6(9) of that Convention calls in addition for a statement of reasons.

85. Since EU law requires that the statement of reasons for such decisions must be communicated but does not prescribe in what form, its communication is subject to the procedural autonomy which the Member States must exercise within the framework of the principles of equivalence and effectiveness. It follows, therefore, that the same considerations apply to the presentation of the reasons for a decision not to carry out an appropriate assessment under Article 6(3) of the Habitats Directive as apply in the case of a decision not to carry out an environmental impact assessment.[50]

86. Where the statement of reasons for a decision not to carry out an appropriate assessment under Article 6(3) of the Habitats Directive is – as in the case in the main proceedings – contained in the decision, the competent authority must therefore ensure that those reasons are recognisable as such and comprehensible from the point of view of their content. Whether a statement of reasons satisfies those requirements is a matter for consideration by the national court. It has the information necessary to assess whether the public in the Member State concerned was able to recognise the reasons as such and understand them.

### *2. Fifth question: dispelling of doubts*

87. By the fifth question, the High Court raises two sub-questions on the content of the statement of reasons for a decision not to carry out an appropriate assessment under Article 6(3) of the Habitats Directive. First, it falls to be determined whether that statement of reasons must be capable of dispelling all reasonable scientific doubt concerning the effects of the works envisaged on the European site concerned. Second, the High Court asks whether the statement of reasons must expressly and individually remove each of the doubts raised in that regard during the public participation process.

#### *(a) Reasonable scientific doubt*

88. The criterion requiring the exclusion of all reasonable scientific doubt, or all reasonable doubt from a scientific point of view, is employed by the Court in the context of the approval of plans or projects under the second sentence of Article 6(3) of the Habitats Directive, after an appropriate assessment has been carried out.[51] At the screening stage, on the other hand, the Court requires

47 Judgments of 17 July 2014, *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67), and of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 83).

48 Judgments of 8 May 2014, *N.* (C-604/12, EU:C:2014:302, paragraphs 49 and 50), and of 9 November 2017, *LS Customs Services* (C-46/16, EU:C:2017:839, paragraph 39).

49 Judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 49).

50 See points 72 and 73 above.

51 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 59); of 17 April 2018, *Commission* v *Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 114); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 120).

an assessment to be carried out to determine whether it can be ruled out, on the basis of objective circumstances, that the plan or project concerned will have a significant effect on the site in question. [52]

89. Screening serves to identify plans or projects which do not require a full assessment because it is clear even without a full assessment that they may qualify for approval. [53] Screening is not intended, however, as a mechanism for circumventing a full assessment, [54] let alone for implementing plans or projects which would not qualify for approval if fully assessed under the second sentence of Article 6(3) of the Habitats Directive. For that reason, the criteria governing the screening must be just as strict as the criteria for the appropriate assessment itself.

90. Consequently, a competent authority in a Member State which is satisfied at the preliminary screening stage that an appropriate assessment under Article 6(3) of the Habitats Directive is not necessary must at least provide an express and detailed statement of reasons which is capable of removing all reasonable scientific doubt concerning the harmful effects of the works envisaged on the integrity of the protected site concerned.

*(b) Every doubt raised?*

91. This does not necessarily mean, however, that the statement of reasons for the decision not to carry out an appropriate assessment must also expressly and individually remove each of the doubts raised in connection with the adverse effects on the protected site during the public participation process.

92. In so far as doubts are not reasonable from a scientific point of view, the competent authority cannot be required to expressly 'remove' them. Quite apart from the fact that there is no justification for devoting an authority's resources to doubts with no scientific foundation, it will in addition often be entirely impossible to dispel such doubts. How, for example, would an authority refute the objection that a project will anger the spirits of the ancestors?

93. The answer to the fifth question which I set out in point 90 therefore holds good for doubts expressed in development consent proceedings only in so far as those doubts are reasonable from a scientific point of view.

*3. Fourth question: consideration of measures in mitigation of adverse effects*

94. The fourth question seeks to ascertain whether, as part of the screening of the need for an appropriate assessment under Article 6(3) of the Habitats Directive, features of the plan or project involving the removal of contaminants that may have the effect of mitigating a harmful effect on the protected site may be taken into account where those features would have been incorporated in the design as standard features irrespective of any effect on the protected site concerned.

[52] Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 44), and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 134).

[53] My Opinion in *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:60, point 72), which the Board – probably on account once again of the English translation – misunderstands, should also be read to this effect.

[54] Judgment of 12 April 2018, *People Over Wind and Sweetman* (C-323/17, EU:C:2018:244, paragraph 37).

95. The background to this question is the judgment in *People Over Wind*, which concerned the consideration at the screening stage of measures that were intended to avoid or reduce the harmful effects of a plan or project on the site concerned. In that case, the Court concluded from the fact that such measures were provided for there was a probability of a significant effect and that, consequently, a full assessment had to be carried out. [55]

96. The Court thus saw in the provision which had been made for measures aimed at mitigating the harmful effects of the project on the protected area an indication that a full assessment was necessary. Without the probability of a significant effect, after all, those measures would not have been necessary.

97. Features of a plan or project which reduce harmful effects on a protected site but are not planned for that reason, on the other hand, are not an indication of the probability of such effects. They are not, after all, based on the assumption of such a probability.

98. An example of features of this kind would be the connection of residential buildings to the collecting system that conducts waste water to a treatment plant. On account, in particular, of the Waste Water Directive, [56] this is a typical feature of residential buildings within the European Union which is required entirely independently of the probability of harmful effects on protected areas. Thus, although that measure limits or even prevents effects on the body of water into which the treated waste water is discharged, this is no indication of the probability that protected sites will be significantly affected. The probability of such effects can, however, still be inferred from other indications.

99. It can be difficult, however, to determine whether a measure serves the purpose of preventing significant effects on the protected site concerned or is independent of that site. In this regard, it is not possible to rely solely on the subjective accounts provided by the developer, as these may be intended to circumvent an appropriate assessment. The assumption that a measure serves a purpose independent of protected sites should instead be based on objective circumstances, in particular general rules or widespread practices.

100. The case in the main proceedings concerns surface water run-off. This is not waste water that must be discharged into the collecting system, as mentioned just now by way of example, but precipitation which is not mixed with the waste water that originates in the residential buildings concerned. An assessment of the risk connected with the indirect discharge of surface water run-off into a protected waterway raises the question of the extent to which the measures to treat that water may be taken into account.

101. According to the request for a preliminary ruling, those treatment measures, similarly to the connection to the waste water collecting system and unlike the measures in the judgment in *People Over Wind*, are not taken to limit the effects on the protected site. On the contrary, these are measures which are taken in all such projects independently of whether a protected site is affected. They are not therefore an indication of the probability of a significant effect on the protected site.

[55] Judgment of 12 April 2018, *People Over Wind and Sweetman* (C-323/17, EU:C:2018:244, paragraph 35).

[56] Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ 1991 L 135, p. 40).

102. The indirect discharge of surface water run-off is still an indication of a significant effect on the protected site. The request for a preliminary ruling does not tell the Court whether this in itself supports the inference of a probability of such adverse effects, but refers to a circumstance, in the form of the treatment measures, which can at least reduce, if not exclude, such a probability.

103. The question, therefore, is whether those treatment measures are objective circumstances, within the meaning of the case-law on the screening stage, which are capable of ruling out the possibility that the project will have a significant effect on the site in question.

104. A further argument employed by the Court in the judgment in *People Over Wind* is relevant here. The Court explained the need for a full assessment by reference also to the fact that a precise analysis in the course of that assessment is the only means of determining at all whether the measures in question do in fact avoid or reduce harmful effects on the protected site. [57]

105. Of decisive importance from the point of view of whether a measure which reduces the harmful effects of a project may be taken into account, therefore, is whether any reasonable scientific doubt concerning the effect of that measure can be ruled out even at the screening stage. This generally presupposes that sufficient practical experience of such measures already exists. If such doubts cannot be ruled out, the measure in question is not capable of ruling out a probability or a risk of a significant effect and cannot be decisively taken into account at the screening stage.

106. In the judgment in *People Over Wind*, the Court also pointed out the risk that taking account of mitigation measures at the screening stage will circumvent the assessment itself. [58] It is also possible – albeit not in the present case – that the circumvention of that assessment would lead to the loss of the public participation necessary in such matters. [59]

107. The taking into account of measures which are adopted irrespective of whether there is a risk that protected sites will be affected cannot, however be regarded as circumventing an appropriate assessment. Disregarding those measures would, on the contrary, amount to a failure to take the project fully into account at the screening stage. This is clearly the case, in my opinion, in the example of the connection to the waste water collecting system: it is hard to imagine residential buildings in the European Union today where the waste water is discharged directly into waterways or even on to the street, as it was in the past. It would therefore be absurd, for the purpose of an appropriate assessment, to assume that such practices might be employed on a housing development. In the case of the contested measures to treat surface water run-off, that position is not quite so obvious but still holds good.

108. The answer to the fourth question must therefore be that, at the stage of screening the need for an appropriate assessment under Article 6(3) of the Habitats Directive, features of the plan or project involving the removal of contaminants that may have the effect of mitigating a harmful effect on the protected site may be taken into account, where it is clear, on the basis of objective considerations, that those features were incorporated into the design as standard features irrespective of any effect on the protected site concerned, and all reasonable scientific doubt concerning their effectiveness can be ruled out.

[57] Judgment of 12 April 2018, *People Over Wind and Sweetman* (C-323/17, EU:C:2018:244, paragraph 36). See also, not least, my Opinion in *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:60, point 71).

[58] Judgment of 12 April 2018, *People Over Wind and Sweetman* (C-323/17, EU:C:2018:244, paragraph 37).

[59] Judgments of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 49), and of 12 April 2018, *People Over Wind and Sweetman* (C-323/17, EU:C:2018:244, paragraph 39).

## V. Conclusion

109. I therefore propose that the Court reply to the request for a preliminary ruling as follows:

(1) The procedural autonomy of the Member States, limited by the principle of effectiveness, allows the parties to a dispute to be required to set out infringements of EU environmental law in a sufficiently clear and precise manner in their written pleadings at an early stage in those proceedings in order for such infringements to be taken into account by the national court. EU law does not as a rule compel or entitle the national court to raise of its own motion pleas alleging such infringements.

(2) In accordance with Article 4(5)(b) 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, as amended by Directive 2014/52/EU of 16 April 2014, and the principle of effectiveness, the statement of reasons for a decision not to carry out an environmental impact assessment must ensure that the reasons are recognisable as such and comprehensible from the point of view of their content. Whether a statement of reasons satisfies those requirements is a matter for consideration by the national court, which has the information necessary to assess whether the public in the Member State concerned was able to recognise the reasons as such and understand them.

(3) In accordance with Article 4(5)(b) of Directive 2011/92, the statement of reasons for the decision not to carry out an environmental impact assessment must, on the basis of objective circumstances and with reference to the relevant criteria listed in Annex III, rule out the probability or the risk that the project concerned will have significant effects on the environment.

(4) At the stage of screening the need for an appropriate assessment under Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2013/17/EU of 13 May 2013, features of the plan or project involving the removal of contaminants that may have the effect of mitigating a harmful effect on the protected site may be taken into account, where it is clear, on the basis of objective considerations, that those features were incorporated into the design as standard features irrespective of any effect on the protected site concerned, and all reasonable scientific doubt concerning their effectiveness can be ruled out.

(5) Where the competent authority in a Member State is satisfied at the preliminary screening stage that an appropriate assessment under Article 6(3) of Directive 92/43 is not necessary, it must at least provide an express and detailed statement of reasons which is capable of removing all reasonable scientific doubt concerning the harmful effects of the works envisaged on the integrity of the protected site concerned. This holds good for doubts expressed in development consent proceedings only in so far as these are reasonable from a scientific point of view.

(6) Where the reasons for a decision not to carry out an appropriate assessment under Article 6(3) of Directive 92/43 are contained in the decision, the competent authority must ensure that those reasons are recognisable as such and comprehensible from the point of view of their content. Whether a statement of reasons satisfies those requirements is a matter for

consideration by the national court, which has the information necessary to assess whether the public in the Member State concerned was able to recognise the reasons as such and understand them.