



Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 21 September 2023¹

Case C-301/22

Peter Sweetman

v

**An Bord Pleanála,
Ireland and the Attorney General,
interveners**

**Bradán Beo Teoranta,
Galway City Council,
Environmental Protection Agency**

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

(Reference for a preliminary ruling – Environment – Directive 2000/60/EC – Framework for EU action in the field of water policy – Article 4(1)(a) – Environmental objectives relating to surface waters – Obligation of the Member States not to authorise a project that may cause deterioration of the status of a body of surface water – Article 5 and Annex II – Characterisation of surface water body types – Article 8 and Annex V – Classification of the ecological status of surface waters – Lake with a surface area below 0.5 km² – Absence of a requirement to characterise and classify that body of water – Obligations imposed on a Member State in the case of a proposed development that may affect that body of water)

I. Introduction

1. Are Member States required to characterise – in accordance with Article 5 of and Annex II to Directive 2000/60/EC –² and subsequently classify the ecological status of – in accordance with Article 8 of and Annex V to that directive – all lakes located within their territory with a surface area below 0.5 km²? If not, what are the obligations of Member States under that directive to ensure the protection of such a body of water when a proposed development is likely to affect it? Those are, in essence, the questions posed by the High Court (Ireland).

¹ Original language: French.

² Directive of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1).

2. Those questions follow on from the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraph 50), in which the Court of Justice held that unless a derogation is granted, any deterioration of the status of a body of water must be prevented, irrespective of the longer-term planning provided for by management plans and programmes of measures.

3. The request for a preliminary ruling has been made in the context of a dispute between Mr Peter Sweetman (‘the applicant’) and the An Bord Pleanála (Planning Board, Ireland; ‘the Board’) concerning the authorisation of a proposed development consisting of extracting water from a lake with a surface area of 0.083 km².

II. Legal context

A. European Union law

4. Article 1 of Directive 2000/60, entitled ‘Purpose’, states as follows:

‘The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:

- (a) prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;

...’

5. Article 2 of that directive, entitled ‘Definitions’, states as follows:

‘For the purposes of this Directive the following definitions shall apply:

- 1. “Surface water” means inland waters, except groundwater; transitional waters and coastal waters, except in respect of chemical status for which it shall also include territorial waters.

...

- 5. “Lake” means a body of standing inland surface water.

...

- 10. “Body of surface water” means a discrete and significant element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or a stretch of coastal water.

...

- 17. “Surface water status” is the general expression of the status of a body of surface water, determined by the poorer of its ecological status and its chemical status.

...

21. “Ecological status” is an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V.

...’

6. Article 4 of that directive, entitled ‘Environmental objectives’, provides as follows in paragraph 1:

‘In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

- (i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;
- (ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;
- (iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

...

(c) for protected areas

Member States shall achieve compliance with any standards and objectives at the latest 15 years after the date of entry into force of this Directive, unless otherwise specified in the Community legislation under which the individual protected areas have been established.

...’

7. Article 5 of the Directive 2000/60, entitled ‘Characteristics of the river basin district, review of the environmental impact of human activity and economic analysis of water use’, is worded as follows in paragraph 1:

‘Each Member State shall ensure that for each river basin district or for the portion of an international river basin district falling within its territory:

- an analysis of its characteristics,

- a review of the impact of human activity on the status of surface waters and on groundwater, and
- an economic analysis of water use

is undertaken according to the technical specifications set out in Annexes II and III and that it is completed at the latest four years after the date of entry into force of this Directive.’

8. Article 6 of Directive 2000/60, entitled ‘Register of protected areas’, states in paragraph 1 that Member States shall ensure the establishment of a register or registers of all areas lying within each river basin district which have been designated as requiring special protection under specific Community legislation for the protection of their surface water and groundwater or for the conservation of habitats and species directly depending on water.

9. Article 8 of that directive, entitled ‘Monitoring of surface water status, groundwater status and protected areas’, states:

‘1. Member States shall ensure the establishment of programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district:

- for surface waters such programmes shall cover:
 - (i) the volume and level or rate of flow to the extent relevant for ecological and chemical status and ecological potential, and
 - (ii) the ecological and chemical status and ecological potential;
- ...
- for protected areas the above programmes shall be supplemented by those specifications contained in Community legislation under which the individual protected areas have been established.

2. ... Such monitoring shall be in accordance with the requirements of Annex V.

...’

10. Article 11 of that directive, entitled ‘Programme of measures’, provides, in its paragraphs 1 to 3:

‘1. Each Member State shall ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4. Such programmes of measures may make reference to measures following from legislation adopted at national level and covering the whole of the territory of a Member State. Where appropriate, a Member State may adopt measures applicable to all river basin districts and/or the portions of international river basin districts falling within its territory.

2. Each programme of measures shall include the “basic” measures specified in paragraph 3 and, where necessary, “supplementary” measures.

3. “Basic measures” are the minimum requirements to be complied with and shall consist of:

...

(e) controls over the abstraction of fresh surface water and groundwater, and impoundment of fresh surface water, including a register or registers of water abstractions and a requirement of prior authorisation for abstraction and impoundment. These controls shall be periodically reviewed and, where necessary, updated. Member States can exempt from these controls any abstractions or impoundments which have no significant impact on water status;

...’

11. Annex II to Directive 2000/60 states as follows:

‘1. Surface waters

1.1. Characterisation of surface water body types

Member States shall identify the location and boundaries of bodies of surface water and shall carry out an initial characterisation of all such bodies in accordance with the following methodology. Member States may group surface water bodies together for the purposes of this initial characterisation.

- (i) The surface water bodies within the river basin district shall be identified as falling within either one of the following surface water categories – rivers, lakes, transitional waters or coastal waters – or as artificial surface water bodies or heavily modified surface water bodies.
- (ii) For each surface water category, the relevant surface water bodies within the river basin district shall be differentiated according to type. These types are those defined using either “system A” or “system B” identified in section 1.2.
- (iii) If system A is used, the surface water bodies within the river basin district shall first be differentiated by the relevant ecoregions in accordance with the geographical areas identified in section 1.2 and shown on the relevant map in Annex XI. The water bodies within each ecoregion shall then be differentiated by surface water body types according to the descriptors set out in the tables for system A.
- (iv) If system B is used, Member States must achieve at least the same degree of differentiation as would be achieved using system A. Accordingly, the surface water bodies within the river basin district shall be differentiated into types using the values for the obligatory descriptors and such optional descriptors, or combinations of descriptors, as are required to ensure that type specific biological reference conditions can be reliably derived.

...

1.2 Ecoregions and surface water body types

...

1.2.2. Lakes

System A

Fixed typology	Descriptors
Ecoregion	Ecoregions shown on map A in Annex XI
Type	Altitude typology high: > 800 m mid-altitude: 200 to 800 m lowland: < 200 m Depth typology based on mean depth < 3 m 3 to 15 m > 15 m Size typology based on surface area 0.5 to 1 km ² 1 to 10 km ² 10 to 100 km ² > 100 km ² Geology calcareous siliceous organic

System B

Alternative characterisation	Physical and chemical factors that determine the characteristics of the lake and hence the biological population structure and composition
Obligatory factors	altitude latitude longitude depth geology size
Optional factors	...

...'

12. Annex IV of that directive, entitled 'Protected areas', states, in paragraph 1, that the register of protected areas required under Article 6 of the directive is to include different types of protected areas, including areas designated for the protection of habitats or species where the maintenance or improvement of the status of water is an important factor in their protection, including relevant Natura 2000 sites designated under Directive 92/43/EEC³ and Directive 79/409/EEC.⁴

13. Annex V of Directive 2000/60 specifies, in respect of surface water status (point 1), the quality elements for the classification of ecological status (point 1.1), in particular with regard to lakes (point 1.1.2).

³ Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

⁴ Council Directive of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1).

B. Irish law

14. Directive 2000/60 has been transposed into Irish law by various regulations, including the European Communities (Water Policy) Regulations 2003⁵ and the European Union (Water Policy) Regulations 2014.⁶

III. The dispute in the main proceedings, the questions referred and the procedure before the Court

15. Loch an Mhuilinn is a privately owned non-tidal inland lake located on Gorumna Island in County Galway (Ireland), with a surface area of 0.083 km², or 8.3 hectares ('the lake'). That lake was not identified by the Irish Environmental Protection Agency ('the EPA')⁷ as a water body falling under Directive 2000/60 as it did not meet the criteria laid down in that directive in relation to surface area or being located in a protected area. As a result, the EPA did not classify the ecological status of the lake within the meaning of Annex V of that directive.⁸

16. The company Bradán Beo Teoranta sought permission from the Board to abstract a maximum of 4 680 m³ of freshwater per week from the lake, for up to 22 weeks annually from May to September.⁹ The abstraction would take place four hours a day for a maximum of four days a week, with the abstracted freshwater being used to bathe diseased salmon to rid them of amoebic gill disease and sea lice. Those salmon were located in four licensed sites operated by that company in Kilkieran Bay, County Galway. The freshwater would be pumped from the lake via a pipeline to a proposed headwall at the coast road where another pipeline would convey the freshwater to tarpaulins which would be towed by boat to the sites where the fish would be treated ('the proposed development'). The Board decided to grant that company the permission sought.

17. The applicant lodged an appeal against that decision before the High Court, the referring court, asserting that, by authorising the proposed development, the Board had breached its obligation under Article 4(1) of Directive 2000/60 to implement the necessary measures to prevent deterioration of the status of that body of surface water.

18. By a judgment of 15 January 2021, the referring court set aside the decision authorising the development solely on the basis that it failed to comply with the requirements of Directive 2000/60. The referring court held that the proposed development would affect the body of water which comprised the lake. However, given that the EPA had failed to assign an ecological status to the lake, it was not possible for the Board to evaluate whether the proposed development complied with the conditions referred to in Article 4(1) of that directive.

19. After that judgment was delivered, Bradán Beo Teoranta decided to seek the views of the EPA, which was not a party to the dispute in the main proceedings and had not been involved in the substantive hearing, regarding its role in the identification of bodies of water as provided for in Directive 2000/60. In its response of 28 January 2021 ('the EPA's response'), which was circulated

⁵ S.I. No 722/2003.

⁶ S.I. No 350/2014.

⁷ It is apparent from the order for reference that, under Article 7 of the European Communities (Water Policy) Regulations 2003, the EPA is the competent authority in Ireland for identifying water bodies under Directive 2000/60.

⁸ For surface water bodies, that annex provides a scale of five ecological status classes, namely 'high', 'good', 'moderate', 'poor' and 'bad'. See judgment of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraph 93).

⁹ In its written observations, the Board stated that those conditions had been imposed in order to ensure the protection of the body of water concerned.

to all parties, the EPA indicated that, in its view, there was no obligation to determine the ecological status of all bodies of water and that it was not and is not obliged to determine the ecological status of the lake. In that regard, the EPA stressed that, as part of the common implementation strategy for Directive 2000/60, involving the European Commission, all the Member States, the accession countries, Norway and other stakeholders and non-governmental organisations, the Commission has drafted Guidance Document No 2, entitled ‘Identification of water bodies’¹⁰ (‘Guidance Document No 2’). Under Section 3.5 of that document,¹¹ Member States have flexibility to decide whether the purposes of the directive, which apply to all surface waters, can be achieved without the identification of every minor but discrete and significant element of surface water as a water body.

20. In its response, the EPA also noted that, under Article 5 of Directive 2000/60 and Annex II (point 1.2.2) to that directive, lakes with a surface area greater than 0.5 km² must be identified as water bodies under that directive. Member States may decide to identify lakes with a surface area below that threshold as water bodies under that directive, in particular if they are ecologically important, if they fall within one of the protected areas listed in Annex IV to the directive, or if they have a significant adverse impact on other surface water bodies. The EPA and the Irish River Basin District Coordinating Authorities applied those principles to the selection of lake water bodies. All lakes with a surface area greater than 0.5 km² and smaller lakes in protected areas were thus identified as water bodies under Directive 2000/60.¹² Also in the view of the EPA, as regards elements of surface water not identified as water bodies under that directive, Section 3.5 of Guidance Document No 2 states that the ‘basic measures’ listed in Article 11 of the directive should be applied.

21. The referring court states that the EPA’s position, that Directive 2000/60 did not require the lake to be identified as a water body under that directive had not been communicated to it at the time of the hearing which took place before the judgment of 15 January 2021. Given the EPA’s response, the Board made an application to have the main proceedings reopened. On 16 April 2021, the referring court granted the application and the matter was re-listed. In that regard, the referring court states that the issues raised by the EPA in its response have the potential to affect the outcome of the main proceedings and that, having regard to the national case-law concerning the criteria for re-opening a decision of the High Court, the threshold for re-opening the case had been comfortably met.

22. As regards the decision to make a preliminary reference, the referring court states that the main proceedings raise the question whether all water bodies, irrespective of their size, must be designated under Directive 2000/60, such that, in the context of an application for consent to carry out a development that could affect a surface water body, the national court hearing the case is able to assess that proposed development by reference to the concepts of ‘deterioration’ and ‘good surface water status’ as provided for in that directive. On that point, the referring court refers, first, to the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433), second, to the fact that the EPA relied heavily on Guidance Document No 2 and the practice of the Commission, and, third, to the absence of any case-law of the Court of Justice on that question.

¹⁰ That document (available only in English) can be consulted at the following address: <https://circabc.europa.eu/sd/a/655e3e31-3b5d-4053-be19-15bd22b15ba9/Guidance%20No%202%20-%20Identification%20of%20water%20bodies.pdf>.

¹¹ See p. 12 of that document.

¹² In its response, the EPA stated that there are an estimated 12 000 lakes in Ireland, of widely varying sizes, and that it had identified 800 lakes as water bodies under Directive 2000/60.

23. In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) (a) Are Member States required to characterise and subsequently classify all water bodies, irrespective of size, and in particular is there a requirement to characterise and classify all lakes with a topological surface area below 0.5 km²?
- (b) To what extent is the position different with respect to water bodies in a protected area, if at all?
- (2) If the answer to question 1(a) is yes, can a competent authority for the purposes of development consent grant development consent for a project that may affect the water body prior to it being categorised and classified?
- (3) If the answer to question 1(a) is no, what are the obligations on a competent authority when deciding upon an application for development consent that potentially affects a water body not characterised and/or classified?’

24. Written observations were submitted to the Court by the applicant, the Board, Ireland, the French, Netherlands and Polish Governments and the Commission.

IV. Analysis

A. The first question referred for a preliminary ruling (Question 1(a))

25. By question 1(a), the referring court is asking, in essence, whether Articles 5 and 8 of Directive 2000/60 must be interpreted as meaning that they require Member States to characterise and classify all lakes with a topological surface area below 0.5 km².

26. Under Article 1(a) of Directive 2000/60, the purpose of that directive is to establish a framework for the protection, in particular, of inland surface waters which prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems.

27. In that regard, Article 4(1) of that directive imposes two objectives which are separate, although intrinsically linked. First, in accordance with Article 4(1)(a)(i) of that directive, in making operational the programmes of measures specified in the river basin management plans in relation to surface waters, Member States are to implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 of that article and without prejudice to paragraph 8 thereof (obligation to prevent deterioration). Second, in accordance with Article 4(1)(a)(ii) and (iii), Member States are to protect, enhance and restore all bodies of surface water with the aim of achieving good status by the end of 2015 at the latest (obligation to enhance).¹³

¹³ See judgment of 5 May 2022, *Association France Nature Environnement (Temporary impacts on surface waters)* (C-525/20, EU:C:2022:350, paragraph 34 and the case-law cited).

28. In order to ensure that the Member States attain those environmental objectives, Directive 2000/60 lays down a series of provisions, in particular Articles 3, 5, 8, 11 and 13 and Annex V, establishing a complex process involving a number of extensively regulated stages, for the purpose of enabling the Member States to implement the necessary measures, on the basis of the specific features and the characteristics of the bodies of water identified in their territories.¹⁴

29. More specifically, as is clear from the case-law of the Court of Justice, in order to achieve the environmental objectives set out in Article 4 of Directive 2000/60, Member States must have a comprehensive overview of the characteristics of the bodies of water concerned. To that end, in accordance with Article 3 of that directive,¹⁵ Member States are to, first, identify the individual river basins, assign them to districts and identify the competent authorities. They must then *characterise* the bodies of water as provided for in Article 5(1) of that directive and in Annexes II ('Annex II') and III to that directive. Under that provision, each Member State is to ensure that for each river basin district falling within its territory, an analysis of its characteristics, a review of the impact of human activity on the status of surface waters and an economic analysis of water use are carried out, in accordance with the technical specifications laid down in Annexes II and III.¹⁶

30. As regards those technical specifications, point 1 of Annex II deals with surface waters and point 1.1 of that annex details the requirements which Member States, having determined the location and boundaries of bodies of surface water, must meet when carrying out the initial characterisation of all such bodies.¹⁷ In that regard, Point 1.1(i) of that annex states that the surface water bodies within the river basin district are to be identified as falling within either one of the following surface water categories: 'rivers, lakes, transitional waters or coastal waters ... or as artificial surface water bodies or heavily modified surface water bodies'. Point 1.1(ii) of that annex indicates that, for each surface water category, the relevant surface water bodies within the river basin district are to be differentiated according to type, defined using either 'system A' or 'system B' identified in point 1.2 of that annex. Point 1.1(iii) of Annex II states that if system A is used, the surface water bodies within the river basin district are first to be differentiated by the relevant ecoregions in accordance with the geographical areas identified in Section 1.2 of that annex and that the water bodies within each ecoregion are then to be differentiated by surface water body types according to the *descriptors set out in the tables for system A*.

31. In the present case, the referring court is seeking to ascertain whether it is necessary to characterise, as provided for in Article 5(1) of Directive 2000/60 and Annex II to that directive, and then to classify, as provided for in Article 8(1) and Annex V, a lake with a surface area below 0.5 km². As that court indicates, in addition to the present case involving such a lake, the more general question arises as to whether, in all the Member States, all bodies of water must be characterised and classified in the context of the application of that directive.

¹⁴ See judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraph 42), and, to that effect, judgment of 24 June 2021, *Commission v Spain* (C-559/19, EU:C:2021:512, paragraph 41).

¹⁵ Article 3 of Directive 2000/60, entitled 'Coordination of administrative arrangements within river basin districts', states in paragraph 1 that 'Member States shall identify the individual river basins lying within their national territory and, for the purposes of this Directive, shall assign them to individual river basin districts. Small river basins may be combined with larger river basins or joined with neighbouring small basins to form individual river basin districts where appropriate. Where groundwaters do not fully follow a particular river basin, they shall be identified and assigned to the nearest or most appropriate river basin district ...'.

¹⁶ See, to that effect, judgment of 24 June 2021, *Commission v Spain (Deterioration of the Doñana natural area)* (C-559/19, EU:C:2021:512, paragraphs 85 to 87).

¹⁷ That provision states that Member States 'may' group surface water bodies together for the purposes of that initial characterisation. Consequently, it is simply an option, for the purpose of ensuring those bodies of water are best protected, and it is not an obligation.

32. Article 2(5) of Directive 2000/60 defines a ‘lake’ as a ‘body of standing inland surface water’. As that definition makes no reference to surface area or other criteria, it is not necessarily clear whether a distinction should be made between a ‘lake’ and other smaller bodies of standing water, such as ponds. However, it is not disputed in the present case that Loch an Mhuilinn is a lake within the meaning of Article 2(5).

33. As regards lakes, point 1.2.2 of Annex II refers, in the context of system A, to a series of descriptors based on the physical characteristics of those bodies of water, namely the ‘altitude typology’, the ‘depth typology based on mean depth’, the ‘geology’ and the ‘size typology based on surface area’. The latter descriptor is broken down as follows: ‘0.5 to 1 km²’, ‘1 to 10 km²’, ‘10 to 100 km²’ and ‘greater than 100 km²’. Therefore, the descriptor for the surface area in system A sets a minimum threshold of 0.5 km² for lakes.

34. Since Article 5(1) of Directive 2000/60 expressly states that characterisation must be undertaken according to the technical specifications set out, in particular, in Annex II, it must be held that that directive does not require Member States, when applying system A, to characterise lakes with a surface area below 0.5 km².

35. In response to a written question from the Court, the referring court stated that Ireland uses system B to characterise bodies of surface water, which does not refer to numerical values. In that respect, it follows from point 1.2.2 of Annex II that, in the context of system B and with regard to lakes, of the ‘physical and chemical factors that determine the characteristics of the lake and hence the biological population structure and composition’, the obligatory factors are altitude, latitude, longitude, depth, geology and *size*. Point 1.1(iv) of that annex states that if system B is used, ‘Member States must achieve at least the same degree of differentiation as would be achieved using system A’ and that, accordingly, the ‘surface water bodies within the river basin district shall be differentiated into types using the values for the obligatory descriptors and such optional descriptors, or combinations of descriptors, as are required to ensure that type specific biological reference conditions can be reliably derived’. It follows from that provision that, in so far as the reference used for system A is a minimum size of 0.5 km² for characterising a lake as provided for in Article 5 of Directive 2000/60, applying system B leads to the result that a lake must have such a surface area in order to be necessarily characterised by the Member State concerned.

36. That interpretation is corroborated by Guidance Document No 2. Although that document is not legally binding,¹⁸ it is interesting to note that, in Section 3.5, concerning ‘small elements of surface water’, it states that the purpose of Directive 2000/60 is to establish a ‘framework for the protection of all waters including inland surface waters, transitional waters, coastal waters and groundwater’, but that ‘surface waters include a large number of very small waters for which the administrative burden for the management of these waters may be enormous’.¹⁹ That document adds, also in Section 3.5, that that directive does not lay down a threshold for very small ‘bodies of water’ and that the ‘Member States have flexibility to decide whether the purposes of the

¹⁸ See, to that effect, judgment of 5 May 2022, *Association France Nature Environnement (Temporary impacts on surface waters)* (C-525/20, EU:C:2022:350, paragraph 31). In that judgment, the Court accordingly applied a different interpretation from that in Guidance Document No 36 on ‘derogations from the environmental objectives according to Article 4(7)’, which also forms part of the common implementation strategy for Directive 2000/60.

¹⁹ Underlining present in the original version. Section 3.5 also indicates that a large number of surface water bodies will fall below the minimum size values set for rivers and lakes in point 1.2 of Annex II.

Directive, which apply to all surface waters, can be achieved without the identification of every minor but discrete and significant element of surface water as a water body', before going on to suggest a possible approach for the protection of those waters.²⁰

37. On that point, I agree with Ireland's analysis that to impose such onerous administrative obligations for small elements of surface water could divert resources intended for the implementation of specific obligations for large water bodies under Directive 2000/60. Consequently, the fact that lakes with a surface area below 0.5 km² are not subject to characterisation as provided for in Article 5 of that directive does not, as such, appear to be incompatible with the objective of that directive of preventing the deterioration of surface waters.

38. Following the characterisation of bodies of surface water as provided for in that Article 5, Member States are required to classify the ecological status of those water bodies in accordance with Article 8 of Directive 2000/60 and Annex V to that directive. However, since Member States are not required to characterise lakes with a surface area below 0.5 km², it follows logically that they are also not required to classify the ecological status of such lakes.²¹ It should be added that that directive does not preclude Member States from exercising their option to characterise and classify lakes with a surface area below 0.5 km² where they consider that to be justified.²²

39. In view of the above, I propose that the answer to the first question should be that Articles 5 and 8 of Directive 2000/60 should be interpreted as meaning that they do not require Member States to characterise and classify all lakes with a topological surface area below 0.5 km².

B. The first question referred for a preliminary ruling (Question 1(b))

40. By question 1(b), the referring court is asking, in essence, whether the answer to question 1(a) is different in the situation where the body of water concerned is located in a protected area as provided for in Directive 2000/60.

1. Admissibility

41. It should be recalled that it is solely for the national court hearing the case, which must assume responsibility for the subsequent judicial decision, to determine, with regard to the particular aspects of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. Consequently, where the questions referred concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling. It follows that questions referred by national courts enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it appears that the interpretation sought bears no relation to the actual

²⁰ Underlining present in the original version. According to Section 3.5, when applying system B, the recommended practice is to use the size of small rivers and lakes according to system A.

²¹ However, as per the examination in the context of the third question referred, since a development project is capable of resulting in deterioration in the status of a lake with a surface area below 0.5 km², the Member State concerned is required to ensure the protection of such a lake as provided for in Directive 2000/60.

²² In its written observations, the French Government stated that the competent national authorities have characterised and subsequently classified small Alpine lakes with a surface area below 0.5 km², on the basis that those lakes have been subject to ecological and scientific monitoring since the 19th century and are therefore a particularly significant and useful sample for monitoring changes in water status in the Alpine environment over a longer period.

facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.²³

42. In the present case, it is apparent from the order for reference that, in its reply, the EPA maintained that the lake did not meet the criterion of being located in a protected area as provided for in Directive 2000/60. In response to a written question from the Court, the referring court stated that the lake did not lie within a protected area but was linked to the Kilkieran Bay and Islands SAC (special area of conservation)²⁴ by a direct tidal connection.²⁵

43. Consequently, it must be stated that the lake is not within a protected area as provided for in Annex IV to Directive 2000/60. I am therefore of the opinion that question 1(b) is hypothetical and, as a result, inadmissible.

2. Substance

44. If the Court were to consider question 1(b) to be admissible, I would point out, in particular, that under Article 4(1)(c) of Directive 2000/60, for protected areas Member States must, in principle, ensure compliance with any standards and objectives at the latest 15 years after the date of entry into force of that directive. Article 6 of that directive requires that Member States ensure the establishment of a register or registers of protected areas. Furthermore, the third indent of Article 8(1) of that directive states that, for protected areas, the water status monitoring programmes are to be supplemented by those specifications contained in EU legislation under which the individual protected areas have been established.

45. Consequently, Directive 2000/60 provides for additional controls to be applied to protected areas. However, the directive does not contain a provision which would modify the territorial scope of the obligation to characterise and classify bodies of surface water, as set down in Annexes II and V to that directive, based on the physical characteristics of the body of water concerned. It should be added that, as noted in point 38 of the present Opinion, Member States have the option of characterising and then classifying lakes with a surface area below 0.5 km² when they are located in protected areas.²⁶

46. In those circumstances, I am of the view that the response to the first question, under (a), does not differ where the body of water concerned is located in a protected area as provided for in Directive 2000/60.

²³ See judgment of 9 February 2023, *VZ (Tenderer definitively excluded)* (C-53/22, EU:C:2023:88, paragraph 23 and the case-law cited).

²⁴ Article 1(l) of the Directive 92/43 defines a 'special area of conservation' as 'a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated'.

²⁵ An 'intertidal zone' is the area that is above water at low tide and submerged at high tide.

²⁶ Ireland stated, in its written observations, that the EPA has characterised all lakes located in protected areas, including those with a surface area below 0.5 km², while noting that that practice is not required by Directive 2000/60.

C. The second question referred for a preliminary ruling

47. By its second question, the referring court is asking, if the answer to the first question is in the affirmative, whether Directive 2000/60 must be interpreted as meaning that the competent national authority can grant consent for a proposed development that may affect a body of surface water where that body of water has not been characterised and classified as provided for in Articles 5 and 8 of that directive.

48. In view of the proposed response to the first question, I consider it unnecessary to respond to the second question referred.

D. The third question referred for a preliminary ruling

49. By its third question, the referring court is, in essence, asking, if the answer to the first question is in the negative, whether Directive 2000/60 must be interpreted as meaning that it imposes obligations on the competent national authority deciding on an application for consent for a proposed development that may affect a lake which has not been characterised and classified as provided for in Articles 5 and 8 of that directive on account of its small surface area, with a view to ensuring the protection of that body of water.

50. As stated in point 28 of the present Opinion, Directive 2000/60 lays down a series of provisions, in particular Articles 3, 5, 8, 11 and 13 of that directive, establishing a complex process involving a number of extensively regulated stages, for the purpose of enabling the Member States to implement the necessary measures, on the basis of the specific features and the characteristics of the bodies of water identified in their territories.

51. In the present case, as is apparent from the proposed response to the first question, the Member State concerned was not required to characterise and classify the lake, as specified in Articles 5 and 8 respectively of that directive. The question is therefore to what extent the subsequent stages in the process laid down by that directive and aimed at ensuring the protection of bodies of surface water must be complied with. In other words, do small bodies of surface water fall outside, as a general rule, the scope of Directive 2000/60? My view is that that question ought to be answered in the negative.

52. In that regard, it is appropriate to refer to the general case-law of the Court of Justice, in accordance with which Article 4(1)(a) of Directive 2000/60 does not simply set out, in programmatic terms, mere management-planning objectives, but has binding effects, once the ecological status of the body of water concerned has been determined, at each stage of the procedure prescribed by that directive. That provision does not therefore contain solely basic obligations, but also concerns individual projects. Accordingly, unless a derogation is granted, any deterioration of the status of a body of water must be prevented, irrespective of the longer-term planning provided for by management plans and programmes of measures. The obligation to prevent deterioration in the status of bodies of surface water remains binding at each stage of implementation of that directive and is applicable *to every type and status* of body of surface water for which a management plan has or should have been adopted. The Member State concerned is consequently required to refuse authorisation for a project where it is such as to result in deterioration in the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of that directive. That implies that, during the procedure for approval of a project, and therefore before the decision is taken, the competent authorities are

required, under Article 4 of Directive 2000/60, to check whether that project may have adverse effects on water which would be contrary to the requirements to prevent deterioration and to improve the status of bodies of surface water and groundwater.²⁷

53. That case-law forms part of the traditional process for protecting bodies of water in the Member States, as described in point 50 of the present Opinion, making reference in particular to the '[determination of] the ecological status of the body of water' and the 'adoption of a management plan' as preliminary matters. It could be inferred that, where those elements have not been established, as in the case in the main proceedings, the body of water concerned does not fall within the scope of Directive 2000/60.

54. In the same vein, Article 4(1)(a) of that directive seeks to prevent the deterioration of the status of all 'bodies of surface water'. However, Article 2(10) of that directive defines a 'body of surface water' as a discrete and 'significant' element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or a stretch of coastal water. That provision could, accordingly, be interpreted as meaning that, in particular, a small lake does not constitute a 'significant' element of surface water, as Ireland and the French and Dutch Governments maintain.

55. However, first, it is apparent from the case-law cited in point 52 of the present Opinion that the obligation to prevent deterioration in the status of bodies of surface water is applicable to 'every type and status of body of surface water'. Accordingly, in addition to simply complying with the process established by Directive 2000/60, the objective of that text is to protect, in particular, all inland surface waters. That objective must take precedence in a situation where the body of water concerned has not been characterised and classified in accordance with Annex II on account of its small surface area.

56. Second, with regard to the term 'significant element' used in Article 2(10) of Directive 2000/60, reference should be made to the *travaux préparatoires* for that directive. Accordingly, in its proposal for a Council directive establishing a framework for Community action in the field of water policy,²⁸ presented on 26 February 1997, the Commission defined a 'body of water' in point 7 of Article 2 of that proposal as a '*discrete and homogenous* element of surface water or groundwater such as an aquifer, a lake, a reservoir, a stretch of stream, river or canal, an estuary or a stretch of coastal water',²⁹ and point 8 of Article 2 defined a 'significant body of water' as follows: 'for the purpose of Article 8 shall mean all waters intended for the production of drinking water from an individual source serving more than 15 households'. When Directive 2000/60 was adopted, those definitions were not retained, and the concept of a 'significant' element of surface water was not defined in that directive.

57. Following a written question from the Court concerning the reasons which led the EU legislature to depart from the original concept of a 'body of water', Ireland submitted that the *travaux préparatoires* support its position that the intention of that legislature was to set a *de minimis* threshold which could be used in practice. For its part, the Dutch Government maintained that the term 'significant element' refers to a spatial criterion, namely the size. As for the Commission, it took the view that there was no need to establish a link between the adjective

²⁷ See judgment of 5 May 2022, *Association France Nature Environnement (Temporary impacts on surface waters)* (C-525/20, EU:C:2022:350, paragraphs 24 to 26 and the case-law cited).

²⁸ COM(97) 49 final.

²⁹ Emphasis added.

‘significant’ and a zone with a surface area of at least 0.5 km² on the ground that it is apparent from the various language versions of Directive 2000/60 that the delimitation of a body of water as ‘discrete and significant’ relates more to topological characteristics than to its size as such.

58. In that regard, I note that Directive 2000/60 does not contain a provision linking the descriptors in the system A tables to the concept of a discrete and ‘significant’ element of surface water. Therefore, a ‘body of surface water’ defined as a ‘discrete and significant element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or a stretch of coastal water’ can, by the use of the term ‘such as’, be understood as referring to a *type* of water element, irrespective of its size, in the present case, any ‘lake’. In other words, an element of surface water which is not ‘significant’ could be an element not covered by that definition, such as a ‘pond’.

59. Admittedly, the descriptors appearing in the system A tables indicate that the EU legislature did not wish to make small-sized lakes subject to characterisation and classification as provided for in Articles 5 and 8 of Directive 2000/60. Nevertheless, as is apparent from the structure of that directive, the EU legislature intended to ensure the protection of all waters in the Member States. In addition, as surface waters are naturally connected, the quality of a small (but not negligible) sized surface water element can affect the quality of another, larger element³⁰. Therefore, a lake with a surface area below 0.5 km² must be protected under that directive.

60. It follows, as noted by the Commission, that where the competent national authority receives an application for consent for a proposed development, the obligation to prevent deterioration applies to any body of surface water that may be affected by that project. Consequently, and in order to guarantee compliance with that obligation, those bodies of water must be covered by a programme of measures as referred to in Article 11 of that directive.³¹ In particular, as stated in paragraph 3(e) of that article, that programme must contain ‘basic measures’, including controls over the abstraction of fresh surface water. However, such a programme of measures does not appear to me to be sufficient to prevent any deterioration in the status of a small body of water. In the light of the case-law cited in point 52 of the present Opinion, the specific project at issue must be examined.

61. Accordingly, I take the view that when consent is sought for a proposed development, the competent national authority must determine the *ad hoc status* of the body of water concerned in order to ensure that that project does not lead to deterioration in its status. To my mind, applying Article 5(1) of Directive 2000/60 by analogy, the Member State must ensure that a review of the impact of human activity on the status of surface waters and an economic analysis of water use are undertaken. That involves establishing evaluation criteria in so far as, in accordance with the case-law of the Court, the obligation to prevent deterioration of the status of a body of water encompasses all changes liable to undermine achievement of the principal objective of that directive.³² Admittedly, such an examination presents certain practical

³⁰ It his written observations, the applicant asserts that the lake forms part of a group of connected lakes, the combined surface area of which exceeds 50 hectares.

³¹ See, to that effect, Section 3.5 of Guidance Document No 2.

³² See, to that effect, judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraph 66).

difficulties, if no prior characterisation and classification have been carried out. However, that examination appears to be a necessary step in order to ensure the protection of surface water in the European Union.³³

62. As follows from the case-law cited in point 52 of the present Opinion, concerning Article 4(1)(a) of Directive 2000/60, the Member State concerned is required to refuse consent for a project where that project is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that that project is covered by a derogation under Article 4(7) of that directive.

63. Consequently, I propose that the response to the third question should be that Directive 2000/60 must be interpreted as meaning that, in the context of the consent procedure for a project concerning a lake which has not been characterised and classified on account of its small surface area, the competent national authorities must ensure, by means of an ad hoc analysis, that that project is not capable of causing deterioration in the status of that body of surface water as provided for in Article 4(1)(a)(i) of that directive.

V. Conclusion

64. In the light of the foregoing considerations, I propose that the Court of Justice answer the questions referred for a preliminary ruling by the High Court (Ireland) as follows:

(1) Articles 5 and 8 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy

must be interpreted as meaning that they do not require Member States to characterise and classify all lakes with a surface area below 0.5 km².

(2) Directive 2000/60

must be interpreted as meaning that in the context of the consent procedure for a project concerning a lake which has not been characterised and classified on account of its small surface area, the competent national authorities must ensure, by means of an ad hoc analysis, that the project is not capable of causing deterioration in the status of that body of surface water as provided for in Article 4(1)(a)(i) of that directive.

³³ As I noted in my Opinion in *Association France Nature Environnement (Temporary impacts on surface waters)* (C-525/20, EU:C:2022:16, point 72), Directive 2000/60 was designed to prevent, as far as possible, deterioration in the status of bodies of water. Accordingly, as is stated in recital 25 of the directive, environmental objectives should be set to ensure that good status of surface water and groundwater is achieved throughout the European Union and that deterioration in the status of waters is prevented at EU level. Those ambitious objectives necessarily entail expenditure for Member States.