



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
TANCHEV  
delivered on 19 April 2018<sup>1</sup>

**Case C-164/17**

**Edel Grace  
Peter Sweetman**

v

**An Bord Pleanála**

joined parties:

**ESB Wind Development Limited,  
Coillte,**

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

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

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

## I. Introduction

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

<sup>1</sup> Original language: English.

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

<sup>3</sup> 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).

<sup>4</sup> 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).

4. Edel Grace and Peter Sweetman ('the applicants') disagree with this. They take the view that, in all of the relevant circumstances, the requirements of Article 6(3) of the Habitats Directive have not been made out. They have instituted proceedings before the Irish courts challenging the permission granted by An Bord Pleanála. This dispute has made its way to the Supreme Court of Ireland which has submitted a reference for a preliminary ruling to resolve the dispute.

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

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

## II. Legal framework

### A. *The Birds Directive*

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

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

...

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

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

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

### B. *The Habitats Directive*

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

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

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

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

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

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

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

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

13. In 2007, Ireland designated the Slieve Felim to Silvermines Mountains Special Protection Area (‘the SPA’)<sup>10</sup> which comprises an area of a little over 20 900 hectares located in Counties Tipperary and Limerick.<sup>11</sup> The conservation objective of the SPA is to maintain or restore the favourable conservation condition of the hen harrier.<sup>12</sup> The SPA is considered to be ‘one of the strongholds’ for the hen harrier in Ireland, and is rated among the top 5 most important sites in Ireland for the

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

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

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

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

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

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

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

species.<sup>13</sup> Ireland's designation of the SPA was prompted by infringement proceedings brought against it by the Commission, whereby in its judgment of 13 December 2007, the Court declared that Ireland had failed to fulfil its obligations under the Birds Directive by, inter alia, failing to designate sufficient SPAs for several bird species including the hen harrier.<sup>14</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

‘Where

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

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

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

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

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

#### IV. Observations of the parties

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

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

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

39. Moreover, the Commission asserts that the two main obligations imposed by Article 6(3) of the Habitats Directive, as interpreted in the Court’s case-law, for the measures proposed in the SHMP have not been fulfilled. First, there is no measure in the SHMP that mitigates the negative impact resulting from the direct permanent loss of 1 hectare of cutover bog and wet grassland and the direct temporary loss of an additional 2 hectares of cutover bog; the measure in the SHMP to restore the

<sup>18</sup> See points 56 and 57 of this Opinion.

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

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

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

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

blanket bog and wet heath areas may compensate for that loss in other parts of the SPA, but does not reduce or avoid it. Likewise, as regards the direct permanent loss of 6 hectares of mature forest and the unavailability of an additional 162.7 hectares of foraging habitat due to the displacement effect of the turbines, the measure in the SHMP concerning ‘sensitive’ management of other forest areas does not address this loss of potentially suitable foraging habitat, but rather seeks to compensate for those effects. Second, the measures in the SHMP could not be predicted with the requisite certainty at the time that the authorities authorised the project in line with the Court’s case-law.

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

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

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

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

44. The developers assert, among other things, that the loss, stemming from the permanent direct loss of 9 hectares of habitat and the unavailability of 162.7 hectares of foraging habitat arising from the displacement effect, must be seen in context. It does not mean that there will not be suitable areas for foraging and nesting by hen harriers elsewhere on the SPA, and the measures proposed in the SHMP ensure that there will always be an area available for foraging and nesting by hen harriers that is at

least the same size as the area currently available. The representative of the developer also stressed at the hearing that the measures proposed in the SHMP are ‘light years away’ from lacking in certainty within the meaning of this as reflected in the Court’s case-law and, in any event, the issue of uncertainty is a question of fact that is not for this Court to assess.

## V. Analysis

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

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

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

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

### A. Preliminary observations

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

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

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

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

51. The Court has ruled that the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by that directive. Thus, Article 6(2) and Article 6(3) of the Habitats Directive are designed to ensure the same level of protection of natural habitats and habitats of species, while Article 6(4) of that directive constitutes a provision derogating from the second sentence of Article 6(3),<sup>26</sup> thereby allowing the competent national authority to authorise a plan or project despite a negative assessment under Article 6(3) in certain circumstances.

52. Article 6(3) of the Habitats Directive provides for an assessment procedure to be carried out by the competent national authorities which is intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site. That provision thus prescribes two stages. The first stage, which is envisaged in the first sentence of Article 6(3) of the Habitats Directive, requires the competent national authorities to carry out an appropriate assessment of the implications for the protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site.<sup>27</sup>

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

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

55. Conversely, it is settled case-law that the competent national authorities must refuse to authorise the plan or project where uncertainty remains as to the absence of adverse effects on the integrity of the site. The Court has reasoned that the authorisation criterion set down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to

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

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

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

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

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

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

prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion, the Court has emphasised, could not ensure as effectively the fulfilment of the objective of site protection intended under that provision.<sup>31</sup>

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

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

58. Therefore, following from the obligations imposed on competent national authorities by Article 6 of the Habitats Directive as interpreted in the Court's case-law, there is a distinction drawn between the protective measures forming part of a plan or project that avoid or reduce any direct adverse effects on the integrity of a site which may be authorised under Article 6(3) of the Habitats Directive, on the one hand, and compensatory measures that compensate for or offset the adverse effects of the plan or project on the integrity of a site within a wider framework which may be authorised under Article 6(4) of that directive, on the other.<sup>36</sup> This sets the backdrop for the Court's pertinent rulings on the scope of Article 6(3) of the Habitats Directive.

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

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

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

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

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

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

<sup>35</sup> *Briels*, paragraph 33; *Orleans*, paragraph 58.

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

60. The request for a preliminary ruling from the Supreme Court of Ireland in *Sweetman* concerned the assessment of certain measures proposed as part of a road development project that involved the permanent and irreparable loss of a part of a designated site's limestone pavement, a priority natural habitat type specially protected by the Habitats Directive.<sup>37</sup> In its judgment, the Court held that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs to be preserved at a favourable conservation status; this entails 'the lasting preservation of the *constitutive characteristics* of the site concerned that are connected to the presence of a natural habitat type *whose preservation was the objective justifying the designation of that site*' in the list of sites of Community importance, in accordance with that directive.<sup>38</sup>

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

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

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

64. Of note, in her Opinion in *Briels*, Advocate General Sharpston rejected the argument put forward by the Netherlands and United Kingdom Governments that the integrity of the site must be considered as a whole in terms of 'net loss or benefit', meaning that it does not matter that a particular habitat is lost in one part of the site, provided that at least an equivalent (and preferably a greater) area and

<sup>37</sup> *Sweetman*, paragraphs 11 to 12 and 26.

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

<sup>39</sup> *Sweetman*, paragraph 45.

<sup>40</sup> *Sweetman*, paragraph 45.

<sup>41</sup> *Sweetman*, paragraphs 46 to 48.

<sup>42</sup> *Briels*, paragraphs 9 and 10.

<sup>43</sup> *Briels*, paragraphs 12, 13 and 18.

<sup>44</sup> *Briels*, paragraph 31.

<sup>45</sup> *Briels*, paragraph 32. See also e.g. *Orleans*, paragraph 52.

<sup>46</sup> *Briels*, paragraph 32.

quality of the same habitat is created elsewhere within the site.<sup>47</sup> While the Advocate General agreed that the integrity of the site should be viewed as a whole, she stressed that in all cases, Article 6(3) of the Habitats Directive requires consideration of the site's conservation objectives, and even if a net beneficial effect is predicted, there is still an adverse — possibly even irreparable — effect on the existing natural habitat and thus on the integrity of the site.<sup>48</sup>

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

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

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

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

69. In its judgment, the Court held that the fish ladder was intended to increase migratory fish stocks by allowing those species to reach their breeding areas more quickly and thus was expected to compensate for the fish deaths near the Moorburg plant so that the conservation objectives of the Natura 2000 areas upstream of the plant would not be significantly affected.<sup>56</sup> However, the impact assessment carried out by the German authorities did not contain definitive data regarding the effectiveness of the fish ladder and merely stated that its effectiveness could only be confirmed following several years of monitoring.<sup>57</sup> It followed that at the time the authorisation was granted, the

<sup>47</sup> Opinion of Advocate General Sharpston in *Briels*, point 40.

<sup>48</sup> Opinion of Advocate General Sharpston in *Briels*, points 41 and 42.

<sup>49</sup> *Orleans*, paragraphs 11 to 16, 20, 21 and 30.

<sup>50</sup> *Orleans*, paragraphs 37 and 55.

<sup>51</sup> *Orleans*, paragraph 55.

<sup>52</sup> *Orleans*, paragraph 56.

<sup>53</sup> *Orleans*, paragraph 59.

<sup>54</sup> *Commission v Germany*, paragraphs 9 and 14.

<sup>55</sup> *Commission v Germany*, paragraphs 6 and 7.

<sup>56</sup> *Commission v Germany*, paragraph 36.

<sup>57</sup> *Commission v Germany*, paragraph 37.

fish ladder, even though it was intended to reduce direct significant effects on the Natura 2000 areas, could not guarantee beyond all reasonable doubt that, together with other measures designed to prevent the negative effects of drawing water from the river, the plant would not adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive.<sup>58</sup>

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

### ***C. Application to the circumstances of these proceedings***

71. I take the view that although the circumstances at issue in the foregoing rulings are not identical to the present case, certain principles elaborated in those rulings support the finding that the measures proposed in the SHMP are insufficient to amount to protective measures that avoid or reduce the direct adverse effects on the integrity of the SPA in question on the basis of Article 6(3) of the Habitats Directive as interpreted by the Court where the SHMP excludes consideration of potential hen harrier habitat.

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

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

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

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

<sup>58</sup> *Commission v Germany*, paragraphs 35 and 38.

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

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

78. The hen harrier is a bird species that is listed in Annex I to the Birds Directive and therefore is deserving of special conservation measures concerning its habitat, according to recital 8 and Article 4 of that directive, in order to ensure its survival and reproduction in its area of distribution.<sup>59</sup> As the Court has held, ‘Article 4 of the Birds Directive lays down a regime which is specifically targeted and reinforced, both for the species listed in Annex I to the directive and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the European Union’.<sup>60</sup> Moreover, the obligations placed on competent national authorities to protect such species exist before any reduction in the number of birds has been observed or before the risk of a protected species becoming extinct has materialised.<sup>61</sup>

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

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

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

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

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

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

## VI. Conclusion

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

Where

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

such measures as are described in (c) cannot be regarded as protective measures forming part of that plan or project aimed at avoiding or reducing any direct adverse effects on the integrity of the site, in order to ensure that that plan or project does not adversely affect the integrity of the site under Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.