



Reports of Cases

OPINION OF ADVOCATE GENERAL

ĆAPETA

delivered on 9 February 2023¹

Case C-444/21

European Commission

v

Ireland

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Article 6(1) – Special areas of conservation – Obligation to establish the necessary conservation measures – General and persistent infringement)

I. Introduction

1. ‘The living world is a unique and spectacular marvel. ... We rely entirely on this finely tuned life support machine and it relies on its biodiversity to run smoothly.’²

2. Biodiversity not only has an intrinsic value, but it is also of utmost importance for human survival. According to the World Economic Forum,³ the possible consequences arising from biodiversity loss⁴ include, at least, food insecurity, exacerbation of climate change and risks to health, business and culture.

3. The European Union recognises problems that the loss of biodiversity might bring.⁵ Part of its fight to preserve biodiversity is the Habitats Directive.⁶

¹ Original language: English.

² Hughes, J., Scholey, K. and Fothergill, A. (dir.), *David Attenborough: A Life on Our Planet*, Netflix Original Documentary, 2020.

³ World Economic Forum, *The Global Risks Report 2020*, available at: https://www3.weforum.org/docs/WEF_Global_Risk_Report_2020.pdf, pp. 47 to 49.

⁴ According to some estimates, the loss of species is estimated to be 1 000 to 10 000 times higher than the natural extinction rate, that is to say, the rate of extinction expected to happen without human interference. That means that, each year, the Earth loses between 0.01% and 0.1% of all species. If low estimates of the number of species are accurate (around 2 million), then between 200 and 2 000 extinctions occur every year. At the upper end of the estimate, between 10 000 and 100 000 species become extinct each year. See the World Wide Fund for Nature website, available at: https://wwf.panda.org/discover/our_focus/biodiversity/biodiversity/.

⁵ See, in that regard, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘EU Biodiversity Strategy for 2030: Bringing nature back into our lives’, COM(2020) 380 final, Brussels, 20 May 2020. One of the results of that strategy is the recent Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM(2022) 304 final, Brussels, 22 June 2022.

⁶ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 97/62/EC of 27 October 1997 (OJ 1997 L 305, p. 42) (‘the Habitats Directive’).

4. The present infringement proceedings concern that directive. On the basis of Article 258 TFEU, the European Commission has brought an action against Ireland for failing to fulfil its obligations under Articles 4(4) and 6(1) of the Habitats Directive.

5. This is the third infringement action which has been brought before the Court – following the judgments of 5 September 2019, *Commission v Portugal (Designation and protection of special areas of conservation)*,⁷ and of 17 December 2020, *Commission v Greece* –⁸ relating to the implementation of Articles 4(4) and 6(1) of the Habitats Directive. Two other actions of a similar type are also pending before the Court,⁹ and additional infringement procedures are ongoing.¹⁰

6. Consequently, the present case is not just another ‘run of the mill’ infringement action brought by the Commission against a Member State on the basis of Article 258 TFEU. Rather, it seems to be part of the Commission’s policy to address insufficient results in the improvement of the state of habitats and the species living in them, which are included in the Habitats Directive.¹¹

7. At the same time, the present case demonstrates several difficulties with which the Court is faced in infringement proceedings alleging the failure of Member States to reach environmental targets. What are precisely the obligations that a Member State must fulfil if it is to be considered that it has properly implemented the Habitats Directive? How is the Commission to prove such a failure, and what can a Member State raise in defence? Additionally, and quite importantly, how is the Court to assess those arguments?

8. As I will show, it is essential, more than in many other areas of EU law, that, in answering these questions, a substantive approach is adopted, avoiding legal formalism and concentrating on the main objective of the Habitats Directive. That objective is to safeguard biodiversity. Within the framework of that directive, this is to be achieved by measures taken by the Member States aimed at maintaining or restoring selected natural habitats and their wild fauna and flora at a favourable conservation status.¹²

9. The Habitats Directive aims, therefore, at achieving the result which is to be perceived in nature. That result is not a network of legal provisions (though some might prove necessary), but the preservation of the biodiversity covered by that directive. The objective of the Habitats Directive cannot be accomplished merely by the adoption of a number of legal norms, nor even by the enforcement of such norms. Many required measures are not legal in the sense of creating rights and obligations for specific subjects. Such measures are often not capable of being evaluated by the usual methods of assessment which the Court uses in infringement proceedings, namely verifying whether a legal measure exists, whether it is enforced in practice and whom it creates rights and obligations for. In the present context, the questions are of a different order and the Court is not equipped to answer them on the basis of its own knowledge. For example, the question whether prohibiting the recreational use of certain parts of a forest is sufficient to save

⁷ C-290/18, not published, EU:C:2019:669.

⁸ C-849/19, not published, EU:C:2020:1047.

⁹ See, in that regard, *Commission v Bulgaria* (C-85/22), pending, and *Commission v Germany* (C-116/22), pending.

¹⁰ The Commission has explained in its application in the present case that there are several other pending infringement procedures of the same type involving Spain, Italy, Cyprus, Latvia and Poland.

¹¹ See, in that regard, European Environment Agency, *State of nature in the EU: Results from the reporting under the nature directives 2013-2018*, EEA Report No 10/2020, Publications Office of the European Union, 2020 (‘the EEA Report’), p. 127, in which it was concluded that the ‘overall progress made across species and habitats towards target 1 is relatively small compared with the 2010 baselines, i.e. the target was not met for any of the groups’.

¹² See Article 2(1) and (2) of the Habitats Directive. For a more detailed description of the system of that directive, see points 29 to 53 of this Opinion.

an endangered species of animals or plants is difficult for the Court to assess. However, it is necessary that the Court be able to rule that a Member State has or has not done what is required by the Habitats Directive.

10. After briefly describing the course of these infringement proceedings against Ireland (II), I will proceed as follows. I will first explain the system of the Habitats Directive and demonstrate that the obligations of the Member States under Articles 4(4) and 6(1) of that directive create an indivisible whole (III). I will then analyse, as requested by the Court, the complaint alleged by the Commission in this case relating to the infringement of Article 6(1) of that directive (IV). I will conclude that Ireland has failed to fulfil its obligations under Article 6(1) of the Habitats Directive, thereby substantively entailing, at the same time, an infringement of Article 4(4) thereof.

II. The course of this case: the pre-litigation procedure and the procedure before the Court

11. This case concerns Ireland's implementation of its obligations under Articles 4(4) and 6(1) of the Habitats Directive in the Atlantic biogeographical region.¹³

12. With respect to that region, the Commission, by its Decision 2004/813/EC,¹⁴ adopted a list of 413 sites of Community importance ("SCIs") within the territory of Ireland. The Commission subsequently updated that list, in particular, by two decisions,¹⁵ which added 11 sites and merged two sites into one, with regard to Ireland. The present case is therefore concerned with the total of 423 sites listed in those three Commission decisions.

13. Following inquiries through an EU pilot procedure, on 27 February 2015, the Commission sent Ireland a letter of formal notice, in accordance with Article 258 TFEU, in which it set out its view that, by failing to designate a number of sites on its territory as special areas of conservation ("SACs"), to set site-specific detailed conservation objectives and to adopt the necessary conservation measures for all of the 423 sites in question, that Member State was in breach of its obligations under Articles 4(4) and 6(1) of the Habitats Directive.

14. On 30 April 2015, Ireland replied to the letter of formal notice, indicating its progress on the designation of SACs and the setting of site-specific conservation objectives. At the same time, it emphasised that Irish law protects sites before their formal designation as SACs. It also provided information on conservation measures which were ongoing in many sites. Further to this, on 9 December 2015, 15 January 2016 and 4 March 2016, Ireland sent the Commission three updates on the designation of SACs and the setting of site-specific conservation objectives.

¹³ This is one of the regions covered by the Habitats Directive, which includes the territory of Ireland in its entirety. See points 25 to 28 of this Opinion.

¹⁴ Commission Decision 2004/813/EC of 7 December 2004 adopting, pursuant to [the Habitats Directive], the list of sites of Community importance for the Atlantic biogeographical region (OJ 2004 L 387, p. 1). Thus, the six-year deadline for the purposes of designating those sites as special areas of conservation under Article 4(4) of the Habitats Directive expired on 7 December 2010.

¹⁵ Commission Decision 2008/23/EC of 12 November 2007 adopting, pursuant to [the Habitats Directive], a first updated list of sites of Community importance for the Atlantic biogeographical region (OJ 2008 L 12, p. 1), and Commission Decision 2009/96/EC of 12 December 2008 adopting, pursuant to [the Habitats Directive], a second updated list of sites of Community importance for the Atlantic biogeographical region (OJ 2009 L 43, p. 466). Thus, taking the latter decision, the six-year deadline under Article 4(4) of the Habitats Directive for the additional sites expired on 12 December 2014.

15. On 29 April 2016, the Commission addressed a reasoned opinion to Ireland, considering that the alleged infringements of Articles 4(4) and 6(1) of the Habitats Directive persisted for the majority of sites.¹⁶ It requested that Member State to put an end to those infringements within a period of two months of receipt of that reasoned opinion.

16. On 27 June 2016, Ireland responded to the reasoned opinion. In particular, it set out the recently approved ‘SAC Designation and Management work programme’ for the completion of SAC designations and site-specific conservation objectives and the development of site-level conservation measures.

17. On 9 November 2018, the Commission addressed an additional reasoned opinion to Ireland, which set out a more detailed analysis of the conservation measures presented by that Member State.¹⁷ According to that opinion, Ireland was requested to put an end to the alleged infringements by 9 January 2019.

18. On 11 January 2019, Ireland responded to the additional reasoned opinion. In particular, that Member State set out its progress and a timetable for completion of the designation of SACs and setting site-specific conservation objectives by the end of 2020 and for identification and implementation of the necessary conservation measures for all sites by 2021. Further to this, on 26 April 2019, 2 May 2019, 11 October 2019, 12 December 2019, 14 January 2020 and 14 April 2020, Ireland provided six updates to the Commission on the designation of sites as SACs, the publication of site-specific conservation objectives and developments concerning site-specific conservation measures.

19. By its application lodged on 16 July 2021, the Commission, considering that, by 9 January 2019, Ireland had still not fulfilled its obligations under Articles 4(4) and 6(1) of the Habitats Directive, brought the present action before the Court under Article 258 TFEU.

20. By its first two complaints, the Commission asks the Court to declare that Ireland has infringed Article 4(4) of the Habitats Directive, first, by failing to designate a number of sites on its territory as SACs (217 out of the 423 SCIs), and, second, by failing to set site-specific detailed conservation objectives for certain sites (140 out of the 423 SCIs).

21. By its third complaint, the Commission asks the Court to declare that Ireland has infringed Article 6(1) of the Habitats Directive by failing to establish the necessary conservation measures for any of the 423 sites listed as SCIs in the relevant Commission decisions.

22. In its defence lodged on 15 October 2021, Ireland, supported by the Federal Republic of Germany,¹⁸ requests the Court to dismiss the present action in its entirety as unfounded.

23. The Commission and Ireland also lodged a reply and a rejoinder on 29 November 2021 and 20 January 2022 respectively.

¹⁶ In that reasoned opinion, the Commission took the view that Ireland had failed to designate 401 sites as SACs, to set site-specific detailed conservation objectives for 335 sites and to establish the necessary conservation measures in any of the 423 sites.

¹⁷ In that additional reasoned opinion, the Commission considered that Ireland had still failed to fulfil its obligations in respect of a large number of sites. It took the view that Ireland had failed to designate 255 sites as SACs, to set site-specific detailed conservation objectives for 198 sites and to establish the necessary conservation measures in any of the 423 sites.

¹⁸ By order of 6 December 2021, the President of the Court granted the Federal Republic of Germany leave to intervene in the present case in support of the form of order sought by Ireland.

24. A hearing was held on 9 November 2022 at which the Commission and Ireland presented oral argument.

III. The Habitats Directive and the obligations of Member States under Articles 4(4) and 6(1) thereof

A. Natura 2000 and the Atlantic biogeographical region

25. The SACs established under the Habitats Directive,¹⁹ together with the special protection areas ('SPAs') established under the Birds Directive,²⁰ form part of Natura 2000, a coherent European ecological network aimed at the long-term survival of the European Union's most valuable and threatened habitats and species.

26. Natura 2000 represents the largest coordinated network of nature conservation areas in the world.²¹ It covers almost one fifth of the European Union's terrestrial land area and approximately 10% of its seas, totalling almost 28 000 sites across the 27 Member States, according to recent reports.²²

27. Natura 2000 is divided up into five marine biogeographical regions and nine terrestrial biogeographical regions, including the Atlantic region at issue in this case. That region encompasses eight (formerly nine) Member States in all or in part (namely the entire territory of Ireland, the Netherlands and the United Kingdom, plus parts of Belgium, Denmark, Germany, Spain, France and Portugal). It comprises over half of the European Union's coastline and two of the most productive seas in the world, the North Sea and the (north-east) Atlantic Ocean. It is also one of the most heavily populated areas in the European Union, with over 100 million people (almost one quarter of the EU population).²³

28. Of relevance to the present case, the Atlantic biogeographical region in the territory of Ireland contains a number of priority²⁴ habitat types and species which are in danger of disappearance. For instance, blanket bogs²⁵ are a certain kind of wetland habitat made up of soft, spongy ground consisting mainly of partially decayed plant matter called peat, which has built up slowly over thousands of years in areas where the climate is cool and wet. They are extremely important, inter alia, for climate change, as they store millions of tonnes of carbon (peat-forming plants such as sphagnum moss and sedges remove carbon from the atmosphere).²⁶ Coastal lagoons²⁷ are parts of the coastline where the ocean meets the land, and they are important ecosystems for the

¹⁹ See the sixth and seventh recitals and Article 3(1) of the Habitats Directive.

²⁰ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), which repealed Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) ('the Birds Directive').

²¹ See, for example, European Union Strasbourg Declaration, 25 February 2022, point 5; Commission Staff Working Document, 'Fitness Check of the EU Nature Legislation (Birds and Habitats Directives)', SWD(2016) 472 final, Brussels, 16 December 2016, p. 24.

²² See, for example, the EEA Report, cited in footnote 11 to this Opinion, p. 6.

²³ See, for example, Commission, 'Natura 2000 in the Atlantic Region', Publications Office of the European Communities, 2009, available at: <https://ec.europa.eu/environment/nature/natura2000/>.

²⁴ See the fifth and eleventh recitals and Article 1(d) and (h) of the Habitats Directive.

²⁵ See 'Sphagnum acid bogs', third indent, under 'Raised Bogs and Mires and Fens' of Annex I to the Habitats Directive.

²⁶ See, for example, Blanket Bog Restoration in Ireland, available at: <https://www.irishbogrestorationproject.ie/>.

²⁷ See 'Open sea and tidal areas', fifth indent, under 'Coastal and Halophytic Habitats' of Annex I to the Habitats Directive.

overall productivity of coastal waters as they support a variety of habitats.²⁸ Likewise, the freshwater pearl mussel (*Margaritifera margaritifera*),²⁹ which is in a state of rapid decline (it is apparently one of the 365 most endangered species in the world), is an amazing species which can live for over 200 years and plays a vital role for ecosystems by filtering water, thus improving its quality.³⁰

B. The system of the Habitats Directive

29. Article 3(2) of the Habitats Directive requires Member States to contribute to the establishment of Natura 2000 according to the representation in their territories of the relevant habitat types and species. Thus, they have to designate for this purpose, in accordance with Article 4 of that directive, sites as SACs and adopt, in accordance with Article 6(1) thereof, measures to preserve those habitat types and species.

30. In my opinion, the most important provision and the *raison d'être* of the Habitats Directive is its Article 6(1), which essentially requires Member States to adopt active conservation measures to preserve the habitats and the species that live in them.

31. In order to be in conformity with the requirements of the Habitats Directive, those conservation measures have to be embedded in the structure as designed by that directive. Only if the measures fit that structure can it be concluded that a Member State has fulfilled its core obligations under that directive.

32. It is, therefore, necessary to briefly explain relevant aspects of the system of the Habitats Directive.

33. Under Article 4 of the Habitats Directive, the procedure for designating sites as SACs takes place in three stages³¹ (or four,³² depending on how they are broken down).

34. First, under Article 4(1) of the Habitats Directive, each Member State proposes a list of sites indicating the natural habitat types and native species they host, which is then transmitted to the Commission.

35. Second, under Article 4(2) of the Habitats Directive, the Commission establishes, in agreement with each Member State, a draft list of SCIs drawn from the Member States' lists. On the basis of that draft list, the Commission, by a binding decision, adopts the list of SCIs. The decisions listing the 423 SCIs on the Irish territory were, as explained above (see point 12 of this Opinion), adopted in 2004, 2007 and 2008 respectively.

²⁸ See, for example, 'Coastal Lagoon', *ScienceDirect*, available at: <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/coastal-lagoon>.

²⁹ See 'Bivalvia', second indent, under 'Molluscs', 'Invertebrates', '(a) Animals', of Annex II to the Habitats Directive.

³⁰ See, for example, Dilly, L., 'Let's Save the Endangered Freshwater Pearl Mussel', *Alerce Environmental Blog*, 16 November 2020, available at: <https://alerceenvironmental.com/endangered-freshwater-pearl-mussel>; Ireland National Parks and Wildlife Service, 'The Freshwater Pearl Mussel', available at: <https://www.npws.ie/research-projects/animal-species/invertebrates/freshwater-pearl-mussel>.

³¹ See, for example, judgments of 6 April 2000, *Commission v France* (C-256/98, EU:C:2000:192, paragraph 7); of 12 June 2019, *CFE* (C-43/18, EU:C:2019:483, paragraph 37); and of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraph 43).

³² See, for example, judgments of 11 September 2001, *Commission v Ireland* (C-67/99, EU:C:2001:432, paragraph 5); of 18 October 2018, *Commission v United Kingdom* (C-669/16, EU:C:2018:844, paragraphs 5 and 60); and of 5 September 2019, *Commission v Portugal* (*Designation and protection of special areas of conservation*) (C-290/18, not published, EU:C:2019:669, paragraph 34).

36. Lastly, under Article 4(4) of the Habitats Directive,³³ once a site has been adopted as an SCI, the Member State concerned designates that site as an SAC. Article 4(4) of the Habitats Directive provides as follows:

‘Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.’

37. In other words, under Article 4(4) of the Habitats Directive, every SCI must be designated by the Member State concerned as an SAC.³⁴ Furthermore, such designation has to happen within six years of the adoption of the binding list of SCIs. That deadline expired in relation to the SCIs at issue in this case in 2010 and 2014, respectively (see footnotes 14 and 15 to this Opinion).

38. Even though Member States have to transform SCIs into SACs, the listing of a site as an SCI by the Commission already has direct legal consequences. According to Article 4(5) of the Habitats Directive, as soon as a site is placed on the list of SCIs adopted by the Commission, it is subject to the obligations set out in Article 6(2) to (4) thereof. Those latter provisions aim to pre-empt any future damage being done to the site or, in exceptional cases where damage has to be tolerated, to minimise that damage.³⁵

39. However, the core provision of Article 6(1) of the Habitats Directive is triggered only by the designation of an SCI as an SAC.³⁶

40. Article 6(1) of the Habitats Directive provides:

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

41. The conservation measures, as the text of that provision clearly states, must correspond to the ecological requirements of the habitat types and species present on the SAC concerned. This means that the designation of an SAC requires not only establishing by a binding act its geographical borders,³⁷ but also setting out the reasons for its existence, or, in other words, the

³³ See also, in that regard, Article 1(l) of the Habitats Directive, which sets out the definition of an SAC, along with the sixth recital thereof.

³⁴ See, for example, judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 207).

³⁵ See Opinion of Advocate General Sharpston in *Sweetman and Others* (C-258/11, EU:C:2012:743, points 43 to 45), and Opinion of Advocate General Tanchev in *Grace and Sweetman* (C-164/17, EU:C:2018:274, point 50). See also, for example, Commission, ‘Managing Natura 2000 sites: The provisions of Article 6 of the “Habitats” Directive 92/43/EEC’, 2019, available at the Commission website cited in footnote 23 to this Opinion, pp. 7 and 8.

³⁶ According to the Commission’s Note on establishing conservation measures for Natura 2000 sites, 18 September 2013, available at the Commission website cited in footnote 23 to this Opinion, p. 3, the designation of a site as an SAC under Article 4(4) of the Habitats Directive triggers the implementation of Article 6(1) of that directive.

³⁷ See, by analogy, judgments of 27 February 2003, *Commission v Belgium* (C-415/01, EU:C:2003:118, paragraph 22), and of 14 October 2010, *Commission v Austria* (C-535/07, EU:C:2010:602, paragraph 64), in which the Court held that the delimitation of an SPA under the Birds Directive must be invested with unquestionable binding force.

objectives to be achieved by such a designation. The Court's case-law considers that the setting of conservation objectives constitutes a mandatory and necessary step in the designation of SACs and the implementation of conservation measures.³⁸

42. The implementation of the necessary conservation measures under Article 6(1) of the Habitats Directive is mandatory. In other words, while Member States retain some discretion as to the choice of the most appropriate means to be applied,³⁹ they cannot choose not to adopt adequate and effective measures, in the sense that they are capable of reaching the objectives of the SAC.

43. Furthermore, even though Article 6(1) of the Habitats Directive does not impose any time limit, given that the conservation measures have to be embedded in the SACs, which, in turn, have to be designated within six years of the adoption of the list of SCIs by the Commission, the conservation measures also have to be adopted within that deadline.

44. In my opinion, two consequences follow from the foregoing. First, Member States cannot fulfil their obligations under Article 6(1) of the Habitats Directive if they have not designated the site as an SAC⁴⁰ and, second, it is necessary when designating SACs that Member States must be clear about the conservation objectives to be achieved within each particular SAC. Otherwise, it cannot be ascertained whether the conservation measures correspond to the ecological needs of the particular habitat type and species.

45. Therefore, the findings of an infringement of Articles 4(4) and 6(1) of the Habitats Directive are necessarily linked. Consequently, it is no surprise that the Commission normally brings infringement proceedings in respect of a failure to fulfil both of those provisions at the same time.

46. In other words, due to the structure as designed by the Habitats Directive, in every situation in which a Member State has not designated an SAC within the period of six years since the adoption of the list of SCIs, it is simultaneously infringing Articles 4(4) and 6(1) of that directive. That is so because conservation measures are properly established only if they are part of the scheme set up by the Habitats Directive.

47. One of the consequences resulting from the designation of an SAC is that conservation measures, as required under Article 6(1) of the Habitats Directive, are established and implemented.⁴¹

48. In the Commission's view, it is possible to raise an infringement of Article 4(4) of the Habitats Directive separately from Article 6(1) thereof if the Member State has not taken formal measures to designate an SAC. However, in my view, it is not possible to conclude that a Member State has properly designated an SAC in substantive terms if it has not established its conservation objectives and conservation measures by which those objectives may be achieved. Accordingly, it

³⁸ See judgment of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraph 52).

³⁹ See judgment of 10 May 2007, *Commission v Austria* (C-508/04, EU:C:2007:274, in particular paragraphs 75, 76, 87 and 89).

⁴⁰ See, in that regard, judgments of 5 September 2019, *Commission v Portugal (Designation and protection of special areas of conservation)* (C-290/18, not published, EU:C:2019:669, paragraph 52), and of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraph 76). In those judgments, the Court considered that measures under Article 6(1) of the Habitats Directive have to be put in place within the framework of a designated SAC.

⁴¹ See, for example, judgments of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 213), and of 22 June 2022, *Commission v Slovakia (Protection of the capercaillie)* (C-661/20, EU:C:2022:496, paragraph 128).

is also true that, by not adopting the necessary conservation measures, the Member State infringes not only Article 6(1) of the Habitats Directive, but also Article 4(4) of that directive understood in substantive terms.

49. A distinct but equally important issue concerns what constitutes a necessary conservation measure for the purposes of Article 6(1) of the Habitats Directive. If we adopt the substantive approach as suggested at the outset of this Opinion (see point 8 of this Opinion), this can only be a measure which is capable, on the basis of current scientific knowledge, to bring about the result envisaged by the conservation objective of a particular SAC. When an SAC has multiple conservation objectives because it concerns particular habitats as well as several animal and plant species which it hosts, the measures under Article 6(1) of the Habitats Directive must cover all those objectives. That approach was confirmed by the case-law in which the Court held that conservation measures must be implemented effectively by complete, clear and precise measures.⁴²

50. In the context of infringement proceedings, the Court is invited to decide whether the conservation measures in question satisfy those requirements on the basis of the evidence brought before it by the Commission and which may be admitted or disputed by the Member State concerned. In that connection, it is not, in my view, necessary for the Commission to demonstrate, or for the Court to assess, the insufficiency of conservation measures for each of the SACs in the territory of the Member State. It suffices to demonstrate a pattern of insufficiency of such measures. It is in this respect that a complaint alleging a general and persistent infringement becomes important (see points 90 to 112 of this Opinion).

51. This, in turn, raises the question of the proof that must be shown and the respective roles carried out by the Commission, the Member State concerned and the Court with regard to verifying compliance with Article 6(1) of the Habitats Directive. The Court has already recognised in that respect that the Commission has no investigative powers of its own, but is dependent on the information provided by the Member States.⁴³ That information could be provided through monitoring and reporting under Articles 11 and 17 of that directive or on the basis of requests by the Commission. In any case, based on the information that it receives, the Commission should be able to verify easily whether conservation measures exist and their linkage to all of the relevant conservation objectives for each of the habitats and species.⁴⁴ As this information is in the hands of the Member State concerned, that Member State is also able to show the existence and extent of the conservation measures and how they relate to the conservation objectives for each site. It therefore seems possible to require the Member State concerned to identify the conservation measures taken for each habitat and each species without requiring the Commission to demonstrate – which would be excessively cumbersome – that none of the conservation measures taken by that Member State concerns that species and that habitat. At the same time, it would still be up to the Commission to demonstrate that the conservation measures which have been presented by the Member State as protecting a species or a habitat are insufficient to fulfil that task. Likewise, the Court of Justice should be able to determine whether

⁴² See judgments of 5 September 2019, *Commission v Portugal (Designation and protection of special areas of conservation)* (C-290/18, not published, EU:C:2019:669, paragraph 53), and of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraph 77).

⁴³ See, for example, judgments of 26 April 2005, *Commission v Ireland* (C-494/01, EU:C:2005:250, paragraph 43); of 26 April 2007, *Commission v Italy* (C-135/05, EU:C:2007:250, paragraph 28); and of 2 May 2019, *Commission v Croatia (Biljane Donje landfill)* (C-250/18, not published, EU:C:2019:343, paragraph 35).

⁴⁴ See, in that regard, Opinion of Advocate General Léger in *Commission v Belgium* (C-324/01, EU:C:2002:489, point 14), in which the Advocate General noted that the Commission fulfils a vital role in the context of the Habitats Directive, since it is the only institution which can coordinate the Natura 2000 network and ensure its coherence, for example with regard to the assessment of the conservation status of a habitat or species in the context of the whole of the EU territory.

the conservation measures are in conformity with Article 6(1) of the Habitats Directive by virtue of the information put before it by the relevant parties, without having to ‘engage in extensive detective work’.⁴⁵

52. Finally, it is important to point out that, by infringing either Article 4(4) or Article 6(1) of the Habitats Directive, a Member State harms not only its own nature conservation areas, but also the efforts at EU level to promote conservation and biodiversity through Natura 2000. As the Court has recognised, it is apparent from the fourth and eleventh recitals of the Habitats Directive that threatened habitats and species form part of the natural heritage of the European Union and that the threats to them are often of a cross-border nature, so that the adoption of conservation measures is a common responsibility of all Member States.⁴⁶

53. The Habitats Directive, which has been touted, for example, as ‘a powerful tool as regard[s] the protection of nature’⁴⁷ and ‘one of the EU’s most formidable pieces of environmental legislation’,⁴⁸ is likely to fail if Member States do not establish the necessary conservation measures for the achievement of the conservation objectives of each site chosen to participate in Natura 2000.

54. It is in this light that I will now turn to the third complaint put forward by the Commission in the present case.

IV. The third complaint, alleging infringement of Article 6(1) of the Habitats Directive

55. By its third complaint, the Commission submits that Ireland has infringed Article 6(1) of the Habitats Directive because it has failed to establish the necessary conservation measures for any of the 423 sites in question.

56. The Commission essentially raises four types of allegations. First, some sites have no conservation measures at all (230 out of the 423 sites). Second, some sites have incomplete conservation measures because they relate to only a subset of the relevant habitat types or species significantly present in those sites (149 of the remaining 193 sites). Third, some sites have conservation measures which are not based on site-specific and clearly defined conservation objectives (the remaining 44 sites). Fourth, in many sites, the existing conservation measures are not effective because they are not sufficiently precise and fail to address all significant pressures and threats. The Commission, additionally, maintains that the latter type of infringement is of a general and persistent nature.

57. I will address each of the four types of allegations separately below.

⁴⁵ See, in that regard, Opinion of Advocate General Sharpston in *Commission v Austria* (C-535/07, EU:C:2010:85, point 79), in which the Advocate General stated: ‘I do not think that it is right for the Court, in infringement proceedings against a Member State, to engage in extensive detective work in order to make good the deficiencies in the Commission’s arguments’.

⁴⁶ See, for example, judgments of 20 October 2005, *Commission v United Kingdom* (C-6/04, EU:C:2005:626, paragraph 25), and of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraph 78).

⁴⁷ Clément, M., ‘Global objectives and scope of the Habitats Directive: what does the obligation of result mean in practice? The European hamster in Alsace’, in Born, C.-H., Cliquet, A., Schoukens, H., Misonne, D. and Van Hoorick, G. (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature’s Best Hope?*, Routledge, London, 2015, p. 9, at p. 13.

⁴⁸ Born, C.-H., Cliquet, A. and Schoukens, H., ‘Outlook’, in *The Habitats Directive in its EU Environmental Law Context: European Nature’s Best Hope?*, cited in footnote 47 to this Opinion, p. 499, at p. 499.

58. Before entering into that analysis, it is important to clarify that, in my opinion, there is no obstacle for the Commission to bring a separate complaint under Article 6(1) of the Habitats Directive if a complaint in relation to the same site has also been brought under Article 4(4) thereof (for instance, for not formally designating an SAC or lacking specific conservation objectives connected with particular SACs).⁴⁹

59. In the present case, the Commission alleges the infringement of Article 6(1) of the Habitats Directive in respect of all of the 423 sites in question, whereas, in relation to some of those sites, the Commission also claims that there is an alleged infringement of Article 4(4) of that directive.

60. As I have already explained (see points 44 to 48 of this Opinion), the finding of the infringement of Article 6(1) of the Habitats Directive automatically means also the infringement of Article 4(4) thereof in substantive terms, as an SAC cannot be understood as being properly established without necessary conservation measures being adopted and implemented. Conversely, finding that a Member State has not formally designated an SAC or established its conservation objectives in breach of Article 4(4) of the Habitats Directive means at the same time that Article 6(1) thereof is also infringed, as conservation measures can only be adopted in conformity with the Habitats Directive if they are linked to a specific SAC and its conservation objectives.

61. Therefore, given the entanglement of those two provisions, even if the allegations of infringement can be assessed separately, the Commission cannot avoid bringing an infringement action in relation to both of them.

A. The allegation that Ireland has not adopted any conservation measures for certain sites

62. The Commission alleges that, based on the information provided by Ireland in the context of the pre-litigation procedure, there are 230 sites for which there are no conservation measures at all.

63. In response to that allegation, Ireland explains that Irish law contains a list of notifiable actions and a list of activities requiring consent ('ARCs'), which identify activities in respect of which the consent of the relevant minister is required before they can be undertaken at a particular site. Both notifiable actions and ARCs are, in Ireland's view, site-specific conservation measures, which operate to prevent damage to relevant species and habitats for each site. Thus, according to Ireland, there are no sites of the 423 in question in respect of which there are no site-specific conservation measures, as every site has a list of notifiable actions or a list of ARCs.

64. However, as indicated by the Commission, the obligation to adopt the necessary conservation measures under Article 6(1) of the Habitats Directive should not be confused with or limited to the adoption of measures aimed at preventing the deterioration of the sites. Such measures are to be adopted on the basis of Article 6(2) of the Habitats Directive immediately after the publication

⁴⁹ See, by analogy, judgment of 2 August 1993, *Commission v Spain* (C-355/90, EU:C:1993:331, paragraphs 20 to 22), relating to the Birds Directive, in which the Court rejected Spain's line of argument that a Member State could not be accused of having infringed both the provisions relating to the classification of a site as an SPA and those relating to the protection measures in such an area at the same time, reasoning that the objectives of protection set out in that directive could not be achieved if Member States had to comply with the obligations concerning the establishment of measures only in cases where an SPA had previously been established. See also Opinion of Advocate General van Gerven in *Commission v Spain* (C-355/90, not published, EU:C:1993:229, point 22).

of the list of SCIs (see point 38 of this Opinion). On the contrary, conservation measures required by Article 6(1) of that directive constitute positive, proactive measures for the maintenance or restoration at a favourable conservation status of the site.⁵⁰

65. According to information provided by Ireland about the lists of notifiable actions and ARCs that apply to each site, they are in many respects general in nature (many are the same for various sites, for example ‘reclamation, including infilling’ and ‘blasting, drilling, dredging or otherwise removing or disturbing fossils, rock, minerals, mud, sand, gravel or other sediment’) and do not provide details as to their effective implementation or how they link up with the ecological requirements of each site.

66. Additionally, Ireland provides a list of 79 sites in respect of which it claims that there is a full and complete set of conservation measures. It also invokes 10 horizontal programmes, which implement conservation measures in relation to habitat types and species rather than by reference to individual sites. It raises those same arguments also in relation to the allegation that Ireland has adopted incomplete conservation measures for certain sites (see points 72 and 76 of this Opinion).

67. However, without the need to enter here into an inquiry about whether the conservation measures for those 79 sites are indeed full and complete, such an argument does not rebut the claim that there are sites in which no conservation measures are in place (the Commission claims that there are 230 such sites). The same is true for the reliance of Ireland on the 10 horizontal programmes. Without additional information, it is difficult to conclude only on the basis of the existence of such programmes that there are no sites without any measures.

68. In my view, therefore, Ireland has not refuted the Commission’s allegation that a number of sites lack any conservation measures.

B. The allegation that Ireland has adopted incomplete conservation measures for certain sites

69. The Commission alleges that, based on the information provided by Ireland in the context of the pre-litigation procedure, for 149 sites there are conservation measures which are incomplete because they cover only a subset of the relevant habitats and species for which the site was designated.

70. In support of that allegation, the Commission relies on the Court’s case-law requiring the implementation of Article 6(1) of the Habitats Directive through complete measures.

71. In that case-law,⁵¹ the Court emphasised that the conservation measures in question were incomplete in that they did not include measures established in a systematic manner according to the ecological requirements of each habitat type and each species present in each of the SACs.

⁵⁰ The same position was also expressed in the Opinion of Advocate General Sharpston in *Sweetman and Others* (C-258/11, EU:C:2012:743, point 42), in which the Advocate General stated that conservation measures for the purposes of Article 6(1) of the Habitats Directive ‘exist, essentially, in order to ensure that positive steps are taken, on a more or less regular basis, in order to ensure that the conservation status of the site in question is maintained and/or restored’.

⁵¹ See judgments of 5 September 2019, *Commission v Portugal (Designation and protection of special areas of conservation)* (C-290/18, not published, EU:C:2019:669, in particular paragraphs 54 and 55), and of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, in particular paragraphs 80 to 86 and 88).

72. In response, Ireland contends that it is currently implementing 10 horizontal programmes across different SACs, which, as mentioned above, implement conservation measures on a habitat- or species-wide basis rather than by reference to individual sites.

73. The Federal Republic of Germany adds in that respect that to be complete and precise, the conservation measures do not necessarily have to be determined individually, ‘species by species’ and ‘habitat type by habitat type’. Depending on the context, a general prohibition of damaging acts can in some cases address all the key threats and pressures, whereas in other cases more differentiating measures are required.

74. In my view, while the implementation of conservation measures through horizontal programmes cannot in itself be seen as problematic, it must be clear how such programmes address each habitat and species in each site.

75. Ireland, however, does not give specific information regarding which of the conservation measures established on the basis of those programmes fulfil the specific conservation objectives for each site. It is, therefore, difficult to conclude merely from information about those horizontal programmes that they satisfy the needs of each habitat and species in each SAC. Moreover, as indicated by the Commission without being rebutted by Ireland, four of those programmes came after the expiry of the deadline in the additional reasoned opinion (see point 17 of this Opinion) and thus cannot be considered in the present case.⁵²

76. Ireland also provides a list of 79 sites which it claims have full and complete conservation measures. However, as indicated by the Commission, this list is not substantiated by any information regarding the full and complete measures for those sites or the dates on which those measures were taken. Ireland furnishes illustrative examples for six sites and for a further 21 sites protecting the lesser horseshoe bat (*Rhinolophus hipposideros*), but does not explain for any of those examples how they are linked to the conservation objectives or that they are complete, taking those objectives into account. Nor does Ireland indicate for those examples the dates on which the conservation measures were established and implemented. The result is that it cannot be ascertained whether they were taken before or after the expiry of the deadline in the additional reasoned opinion (see point 17 of this Opinion).⁵³

77. Allow me to give several examples.

- Site IE000090 Glengarriff Harbour and Woodland SAC hosts a priority habitat type (alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*) along with one additional habitat type (old sessile oak woods with *Ilex* and *Blechnum* in the British Isles) and four species (the Kerry slug (*Geomalacus maculosus*), the lesser horseshoe bat, the otter (*Lutra lutra*) and the common seal (*Phoca vitulina*)). There are six conservation measures listed for that site. They are, however, general in nature (‘Control programme for invasive alien species’, ‘Management regime for native woodland’, ‘Regime for managing recreational activities’, ‘Regime for managing wild herbivores’, ‘Management of roost for bats’ and ‘Communications and knowledge transfer programme’). There is no specific information provided as to how those conservation

⁵² According to settled case-law, in an action under Article 258 TFEU, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes. See, for example, judgments of 13 December 2007, *Commission v Ireland* (C-418/04, EU:C:2007:780, paragraph 74), and of 16 July 2020, *Commission v Ireland (Anti-money laundering)* (C-550/18, EU:C:2020:564, paragraph 30).

⁵³ I note that the Commission listed several of those sites as having no conservation measures at all based on the information it received from Ireland in the pre-litigation procedure.

measures match the specific conservation objectives set for each of those habitats and species on the site.⁵⁴ There are many conservation objectives for which the corresponding conservation measures appear to be lacking (for example, as regards the common seal, only the third and sixth conservation measures above are indicated, without any mention of objectives concerning breeding sites and moult and resting haul-out sites), and there are no conservation measures whatsoever for the otter.

- Site IE00000364 Kilgarvan Ice House SAC hosts one species (the lesser horseshoe bat) and there are three conservation measures indicated ('Management of roost for bats', 'Planting of trees' and 'Purchase of land'). For this site, Ireland listed seven specific conservation objectives regarding the maintenance of the population, winter roosts, summer roosts, auxiliary roosts, the extent of potential foraging habitat, linear features (commuting routes) and light pollution, with no indication as to how the measures and objectives relate.
- Site IE0000412 Slieve Bloom Mountains SAC hosts one priority habitat type (blanket bogs) and two additional habitat types (Northern Atlantic wet heaths with *Erica tetralix* and alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*) and there are 10 conservation measures listed ('Control programme for invasive alien species', 'Establishment of fire management plan', 'Management regime for native woodland', 'Regime for managing recreational activities', 'Regime for managing wild herbivores', 'Regime for repairing/maintaining path to prevent damage to sensitive area', 'Drain blocking programme', 'Installation of path/track to prevent damage to sensitive areas', 'Communications and knowledge transfer programme' and 'Regime to increase habitat resilience to fire'). However, it is not specified how those match up with the 19 site-specific conservation objectives for that priority habitat, along with 20 and 13 site-specific conservation objectives respectively listed for those two additional habitats, relating to, inter alia, habitat area, habitat distribution, ecosystem function, community diversity, vegetation composition, vegetation structure, physical structure drainage and erosion, indicators of local distinctiveness, woodland size and woodland structure.
- Site IE0001242 Carrowmagappul Bog SAC hosts one priority habitat type (active raised bogs) and two additional habitat types (degraded raised bogs still capable of natural regeneration and depressions on peat substrates of the *Rhynchosporion*) and there are 12 conservation measures listed that are in large part generic (for example, 'Clearfelling of plantation forest', 'Determination of ownership', 'Control programme for invasive alien species', 'Drain management regime', 'Regime for managing turf-cutting' and 'Drain blocking programme'). There are, at the same time, 17 conservation objectives concerning habitat area, habitat distribution, high bog area, water levels, flow patterns, transitional areas, vegetation quality, typical active raised bog species, elements of local distinctiveness, negative physical indicators, vegetation composition, air quality and water quality.
- Site IE0002010 Old Domestic Building (Keevagh) SAC, designated for the protection of the lesser horseshoe bat species, has one conservation measure listed ('Management of roost for bats') with details given ('Chimney and windows repaired; further work required as building has deteriorated'), whereas there are five site-specific detailed conservation objectives listed concerning the population per roost, summer roosts, extent of potential foraging habitat, linear features and light pollution.

⁵⁴ Site-specific conservation objectives for SACs may be found on the website of the National Parks and Wildlife Service (<https://www.npws.ie>), which is responsible for the implementation of the Habitats Directive in Ireland. For that SAC, there are 12 such objectives reported for that priority habitat type, 13 for the additional habitat type, 4 for the Kerry slug, 7 for the lesser horseshoe bat, 8 for the otter and 5 for the common seal.

78. I thus fail to see how the evidence put forward by Ireland substantiates that those examples can be considered to demonstrate that sites have full and complete conservation measures. The fact that there may be some conservation measures for some sites is not sufficient, in my opinion, to comply with the requirements of Article 6(1) of the Habitats Directive.

79. In my view, therefore, Ireland has not refuted the Commission's allegation that a number of sites lack complete conservation measures.

C. The allegation that conservation measures adopted by Ireland are not based on conservation objectives

80. The Commission alleges that, based on the information provided by Ireland in the context of the pre-litigation procedure, for (at least) 44 sites, the conservation measures are not based on the conservation objectives set for each site.

81. The Commission understands the requirements of Article 6(1) of the Habitats Directive to base conservation measures on site-specific detailed conservation objectives as having substantive (objectives and measures must correlate) and sequential (objectives must not succeed measures) components. In the Commission's view, this is in line with the context and objectives of that directive. As the Commission emphasised at the hearing, the situation in which a Member State first establishes conservation measures and then sets conservation objectives, where the former then happens to correspond fully to the latter, is unrealistic, and there is a significant risk that conservation objectives would not serve as a yardstick to assess the appropriateness of the conservation measures, but would merely mirror such measures.

82. Ireland, supported by the Federal Republic of Germany, disputes the Commission's allegations. In particular, those two Member States contend that there is no requirement that conservation objectives must be set prior to the establishment of conservation measures.

83. As Ireland emphasised at the hearing, Article 6(1) of the Habitats Directive does not mandate a specific sequencing between conservation objectives and conservation measures, as this is not supported by the text of that provision or the Court's case-law. Ireland submits that there are 37 sites in which the conservation measures were based on a tailored assessment of threats and pressures despite the fact that site-specific conservation objectives had not yet been developed and published.

84. The Federal Republic of Germany emphasises that an infringement of Article 6(1) of the Habitats Directive cannot arise from the mere fact that conservation measures have already been taken before conservation objectives were set; the decisive factor must be whether the necessary conservation measures are taken and are effective as such.

85. In that regard, contrary to the arguments put forward by the Commission, I am not persuaded that conservation measures do not comply with Article 6(1) of the Habitats Directive simply because the conservation objectives were set after the establishment of such measures. What matters in my view is whether the necessary conservation measures are adequate and effective to address the ecological requirements of the habitats and species for which the site was designated.

86. The Commission's argument about the risk that, if the order is reversed, the conservation objectives will be made to match the conservation measures does not seem convincing to me. Rather, it is more likely that the needs of a site were already recognised by the Member State, even if not formally expressed as conservation objectives. It is difficult to accept that Member States had established conservation measures with no good reason.

87. However, that does not mean that, even if pre-existing, the conservation measures should not correspond to the conservation objectives of particular sites in order to satisfy the requirements of Article 6(1) of the Habitats Directive. It also does not mean that the conservation objectives should not be clearly stated. Setting conservation objectives is, as it follows from the Court's case-law,⁵⁵ a mandatory and necessary step in the designation of SACs and the implementation of conservation measures (see point 41 of this Opinion).

88. Therefore, I consider the Commission's claim that Ireland has infringed Article 6(1) of the Habitats Directive by establishing the conservation measures before setting the conservation objectives to be unfounded.

89. Nevertheless, in so far as Ireland has not refuted that the conservation measures cannot be matched to the conservation objectives for the sites in question, the Commission's allegation regarding the infringement of Article 6(1) of the Habitats Directive is well founded.

D. The allegation that conservation measures adopted by Ireland are not effective and that Ireland has committed a general and persistent infringement

90. The Commission alleges that, based on the information provided by Ireland in the context of the pre-litigation procedure, Ireland has generally and persistently infringed its obligations arising under Article 6(1) of the Habitats Directive by systematically establishing conservation measures which are not sufficiently detailed and do not address all of the threats and pressures for the habitats and species on each site.

91. Therefore, the Commission claims not only that some conservation measures do not satisfy qualitative requirements in that they are not sufficiently effective, but also that the adduced examples are representative of a pattern resulting in a general and persistent infringement committed by Ireland.

92. The Commission invokes three examples involving two priority habitat types (coastal lagoons and blanket bogs) and one priority species (the freshwater pearl mussel) to demonstrate that conservation measures are of insufficient quality because they lack quantitative terms, do not indicate responsible actors or timelines and fail to address the key pressures and threats affecting those habitats and species.⁵⁶

⁵⁵ See judgment of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraph 52).

⁵⁶ According to the Commission, for coastal lagoons Ireland designated 25 sites but reported conservation measures for only three of those sites, which lack quantitative terms, do not indicate the responsible actors or timelines for action and fail to address key pressures and threats, such as those relating to pollution and discharges. For blanket bogs, Ireland designated 50 sites but indicated certain conservation measures for only 13 of those sites, which are extremely generic, lack quantitative specification of planned conservation measures and do not address certain major pressures and threats, such as windfarm and other infrastructural developments, peat cutting, erosion, burning and drainage. For the freshwater pearl mussel, Ireland designated 19 sites but reported conservation measures for only three sites without specifying quantitative terms or responsible actors and timelines and failed to address key pressures and threats, such as those from diffuse and point sources.

93. In the case-law referred to by the Commission,⁵⁷ the Court has explained that conservation measures need to be not only complete, but also clear and precise. The requirement of completeness was dealt with in relation to the second allegation of the Commission in the present case (see points 69 to 79 of this Opinion). The Court has, however, not yet had the opportunity to clarify in detail what the requirement for clear and precise measures entails. Thus far, the Court has considered that conservation measures were insufficient if they were generic and programmatic or that they required further implementing measures to become effective.

94. I can agree with the Commission that effective conservation measures need to address all of the key threats and pressures for the habitats and species on each site. I can also agree that such measures must be sufficiently specific and detailed to respond to the needs of the particular site. However, whether sufficient precision necessitates quantification or identification of the relevant actors and timelines in advance cannot be prescribed generally, but depends on the circumstances of the particular site and the types of measures suitable for its needs. What is decisive is that it is possible to implement such measures.⁵⁸ Therefore, if, without the identification of responsible actors, timelines or quantified targets, one cannot expect the implementation to occur, such measures need to contain these kinds of details in advance. If, on the contrary, that is not necessary in a particular case, a Member State has to explain why the measure is nevertheless capable of being implemented effectively.

95. Ireland does not introduce any arguments in order to refute the information produced by the Commission alleging the ineffectiveness of the conservation measures in respect of the three examples.

96. Inasmuch as the 27 examples put forward by Ireland in relation to having full and complete conservation measures can be understood also as a response to the allegation regarding the insufficient quality of those measures, I observe that only one example (the Slieve Bloom Mountains SAC mentioned in point 77 of this Opinion involving blanket bogs) relates to any of the priority habitats and species invoked by the Commission to substantiate that allegation.

97. In that respect, as the Court has consistently held, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Commission, which is responsible for proving the existence of the alleged infringement, to provide the Court with the information necessary for it to determine whether that infringement is made out, and the Commission may not rely on any presumption.⁵⁹ Where the Commission has adduced sufficient evidence to establish that the national provisions transposing a directive are not applied correctly in practice in the territory of the defendant Member State, it is incumbent on the latter to challenge in substance and in detail the information produced and the inferences drawn.⁶⁰

⁵⁷ See judgments of 5 September 2019, *Commission v Portugal (Designation and protection of special areas of conservation)* (C-290/18, not published, EU:C:2019:669, in particular paragraphs 53 and 55), and of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraphs 77 and 82).

⁵⁸ See judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraphs 213 and 214).

⁵⁹ See, for example, judgments of 28 March 2019, *Commission v Ireland (System for collecting and treating waste water)* (C-427/17, not published, EU:C:2019:269, paragraph 38), and of 8 March 2022, *Commission v United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 221).

⁶⁰ See, for example, judgments of 28 March 2019, *Commission v Ireland (System for collecting and treating waste water)* (C-427/17, not published, EU:C:2019:269, paragraph 39), and of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 112).

98. In my view, in this case, the Commission has adduced sufficient evidence that conservation measures in respect of the three examples are of insufficient quality to satisfy the qualitative requirements of Article 6(1) of the Habitats Directive, whereas Ireland has not put forward any evidence to refute that allegation.

99. I therefore consider that, in relation to the habitats and species adduced as examples by the Commission, Ireland has failed to fulfil its obligations under Article 6(1) of the Habitats Directive to adopt effective measures.

100. The Commission further argues that those three examples are representative of a general and persistent infringement because they concern a large number of sites, are indicative of the geographical configuration of the SAC network in Ireland and relate to habitats and species for the conservation of which that network is critical.

101. Thus, even if the Commission has not adduced specific arguments in relation to other SACs relating to different habitats or species, by invoking a general and persistent infringement the Commission implies that the infringement of Article 6(1) of the Habitats Directive also exists in other areas if the measures adopted in the framework of these other SACs do not satisfy qualitative requirements.

102. Ireland has neither refuted the concrete allegations in the examples put forward by the Commission, nor has it opposed the claim that these examples are representative in the sense that it may be concluded that a general and persistent infringement of Article 6(1) of the Habitats Directive exists.

103. What is the added value, if any, of submitting that an infringement is of a general and persistent nature?

104. The Commission started the practice of alleging a general and persistent infringement in environmental proceedings in the case that gave rise to the judgment in *Commission v Ireland*.⁶¹ In that judgment,⁶² the Court recognised that ‘in principle nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State’s authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a general practice contrary thereto, which the particular situations illustrate where appropriate’.

105. This line of case-law involving a general and persistent infringement⁶³ basically signifies that the Commission may bring infringement proceedings against a Member State because it has allegedly infringed EU law in a general and persistent manner on the basis of specific instances,

⁶¹ See judgment of 26 April 2005 (C-494/01, EU:C:2005:250).

⁶² Judgment of 26 April 2005, *Commission v Ireland* (C-494/01, EU:C:2005:250, paragraph 27). See, more recently, for example, judgment of 5 September 2019, *Commission v Italy (Bacterium Xylella fastidiosa)* (C-443/18, EU:C:2019:676, paragraph 73); see also Opinion of Advocate General Geelhoed in *Commission v Ireland* (C-494/01, EU:C:2004:546, in particular points 15 to 22 and 43 to 60).

⁶³ See, for example, judgments of 26 April 2005, *Commission v Ireland* (C-494/01, EU:C:2005:250, paragraphs 127 and 174), and of 2 December 2014, *Commission v Italy* (C-196/13, EU:C:2014:2407, paragraph 33) (‘general and persistent’). Similar descriptors may also be used. See, for example, judgments of 10 September 2009, *Commission v Greece* (C-416/07, EU:C:2009:528, paragraph 25) (‘structural and general’), and of 10 November 2020, *Commission v Italy (Limit values – PM10)* (C-644/18, EU:C:2020:895, paragraphs 75 and 77) (‘systematic and persistent’).

as compared to typical infringement proceedings which target isolated incidents.⁶⁴ Therefore, the added value of this type of complaint seems to be that, if a Member State is found by the Court to have committed such a general and persistent infringement of EU law, this is likely to require a general change in practice across the board, instead of merely remedying the specific breaches identified.⁶⁵

106. As explained by Advocate General Geelhoed in his Opinion in *Commission v Ireland*,⁶⁶ to establish that an infringement by a Member State is general and persistent, it is possible to take into consideration dimensions of scale, time and seriousness. The dimension of scale would mean, in my view, that the examples on the basis of which the infringement is demonstrated are representative of the behaviour of a Member State across the areas covered by a directive. The dimension of time implies that the infringement persists over a longer period, while the dimension of seriousness may be linked to the first two dimensions or to the importance of the consequences which follow from the non-implementation of a particular piece of EU legislation.

107. When it comes to establishing the dimensions which allow the conclusion that the infringement is of a general and persistent nature, in my view, nothing changes in relation to the burden of proof. The Commission has to adduce sufficient evidence to demonstrate that a Member State has committed a general and persistent infringement on the basis of a number of examples which are to be regarded as representative of the practice of the Member State at issue and on the basis of such a pattern it is likely that the same type of infringement exists in respect of other individual situations not specifically dealt with. It is incumbent on the Member State to challenge in substance and in detail the information produced in relation to these examples and the inferences drawn.⁶⁷

108. In the present case, Ireland has not put forward any arguments to challenge the Commission's allegation that the three examples are representative of the general and persistent infringement alleged.

109. In my view, therefore, Ireland has not refuted the Commission's allegation that it has committed a general and persistent infringement of Article 6(1) of the Habitats Directive by systematically establishing conservation measures which are not sufficiently detailed and do not address all of the threats and pressures for the habitats and species on each site.

110. Additionally, given that effective measures in the majority of the SACs at issue were supposed to be adopted and implemented as far back as 2010, the dimension of time necessary for the finding of general and persistent infringement is, to my mind, present. If this is coupled with the seriousness of consequences of the infringement which might follow, especially as some

⁶⁴ See further, for example, Wennerås, P., 'A New Dawn For Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments', *Common Market Law Review*, Vol. 43, 2006, p. 31, at pp. 33 to 50; Lenaerts, K. and Gutiérrez-Fons, J.A., 'The General System of EU Environmental Law Enforcement', *Yearbook of European Law*, Vol. 30, 2011, p. 1, at pp. 9 to 11; Prete, L., *Infringement Proceedings in EU Law*, Wolters Kluwer, Alphen-sur-le-Rhin, 2017, pp. 95 to 98. As indicated in the scholarly literature, this line of case-law is not the same as that concerning administrative practice in the context of infringement proceedings. See, for example, Lenaerts, K., Maselis, I. and Gutman, K., *EU Procedural Law*, Oxford University Press, Oxford, 2015, p. 167.

⁶⁵ See, in that regard, Opinion of Advocate General Geelhoed in *Commission v Ireland* (C-494/01, EU:C:2004:546, point 48); see also, for example, Wennerås, cited in footnote 64 to this Opinion, pp. 42 to 46, and Prete, cited in footnote 64 to this Opinion, p. 97. This gives rise to the possibility of the Member State concerned having to pay pecuniary penalties pursuant to Article 260(2) TFEU if the general and persistent infringement is not remedied. See, for example, judgment of 2 December 2014, *Commission v Italy* (C-196/13, EU:C:2014:2407).

⁶⁶ C-494/01, EU:C:2004:546, point 43.

⁶⁷ See, for example, judgments of 26 April 2005, *Commission v Ireland* (C-494/01, EU:C:2005:250, paragraphs 46 and 47), and of 26 April 2007, *Commission v Italy* (C-135/05, EU:C:2007:250, paragraph 32).

processes might become irreversible if necessary measures are not taken, I am of the opinion that the conditions for finding a general and persistent infringement of Article 6(1) of the Habitats Directive are fulfilled in the present case.

111. Accordingly, I consider that the Commission has sufficiently demonstrated that Ireland has failed to fulfil its obligations to establish the necessary conservation measures within the meaning of Article 6(1) of the Habitats Directive in a general and persistent manner.

112. On the basis of the foregoing reasons, the third complaint raised by the Commission is well founded.

V. Conclusion

113. In the light of the foregoing considerations and without prejudice to the examination of the other complaints raised in this case, I propose that the Court declare that Ireland has failed to fulfil its obligations under Article 6(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, by failing to establish the necessary conservation measures which correspond to the ecological requirements of the natural habitat types in Annex I to that directive and the species in Annex II thereto present on the sites.