

APPROVED



## **THE COURT OF APPEAL**

### **ORDER FOR A REFERENCE PURSUANT TO ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION**

**Neutral Citation Number [2024] IECA 295**

**Record Number: 2024/153**

**High Court Record Number 2022/1016**

**IN THE MATTER OF S.50 OF THE PLANNING AND DEVELOPMENT ACT  
2000, AS AMENDED and S.3 OF THE ENVIRONMENTAL (MISCELLANEOUS  
PROVISIONS) ACT 2011, AS AMENDED**

**Meenan J.  
O'Moore J.  
Hyland J.**

**BETWEEN/**

**MOYA POWER AND  
WILD IRELAND DEFENCE CLG  
APPLICANTS/APELLANTS**

**- VS -**

**AN BORD PLEANÁLA  
MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE  
IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS/RESPONDENTS**

**AND**

**KNOCKNAMONA WINDFARM LIMITED**

**NOTICE PARTY/ RESPONDENT**

## **Order of the Court for reference on 13 December 2024**

### **Summary**

1. Having considered the arguments raised by the parties, the Court of Appeal of Ireland has decided to make a preliminary reference pursuant to Article 267 TFEU. In drawing up this Order for Reference, we have had regard to the recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01).

### **The parties to the proceedings**

2. The parties to these proceedings are identified in the title above. The appellants are Moya Power and Wild Ireland Defence CLG. The respondents are An Bord Pleanála, the Minister for Housing, Local Government and the Attorney General. Knocknamona Windfarm Limited are a third party.

### **Subject matter of the dispute and the relevant findings of fact**

3. In short, this case concerns a net but important point of interpretation of the Habitats Directive i.e. whether an appropriate assessment (“AA”) compliant with Article 6(3) of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora as amended (the “Habitats Directive”) can take place where a Member State has not formulated a site-specific conservation objective for a particular special protection area (“SPA”). This raises an issue of EU law of general application. We are satisfied that the question being put has not previously been decided by the Court of Justice of the European Union (“CJEU”).
4. The question arises in the context of a dispute about the validity of a decision of An Board Pleanála (“the Board”) of 28 September 2022 to grant planning permission (hereafter referred to as “development consent”) to Knocknamona Windfarm Ltd for

amendments to a previously permitted windfarm in County Waterford, Ireland, whereby the developer is being permitted an increase in the upper most tip height of the previously authorised turbines from a maximum of 126 meters to a maximum of 155 meters, and an amendment of the height and design of the previously authorised meteorological mast from a tubular tower mast to a maximum of 80 meters to a lattice tower mast to a maximum of 99 meters. When considering the application for development consent, the Board carried out an AA of the implications of the proposed development for five identified European sites, including the Blackwater Callows SPA, located in Cork and Waterford. This SPA is 13km from the wind farm site at its nearest point and 13.5km from the nearest turbine. The appellants' case only concerns the Blackwater SPA. It is not disputed that there were no site-specific conservation objectives for the Blackwater Callows at the time of the Board's decision.

5. The Board relied upon its inspector's report in making the decision. That report recorded that the conservation objectives for the Blackwater Callows SPA were a "generic conservation objectives document". The qualifying interest ("QI") of the Blackwater site are the Whooper Swan, widgeon, teal, Black-Tailed Godwit and the wetland habitats in the SPA and the waterbirds that use them. The inspector for the Board concluded that, in respect of the QIs other than the Whooper Swan, adverse effects on the integrity of the site could be excluded on the basis that the habitats within the windfarm sites were unsuitable for any of these species. In respect of the Whooper Swan, the inspector concluded that the relevant surveys did not indicate the presence of the Whooper Swan within or close to the site, and therefore concluded that the additional height and rotor diameter proposed would not have an adverse effect on the integrity of the site vis-a-vis these species. No party disagrees with that

finding of fact. Therefore, the Board decided that the development would not adversely affect the integrity of the Blackwater Callows SPA.

6. The appellants issued judicial review proceedings arguing *inter alia* that, absent conservation objectives for the Blackwater Callows SPA, the Board had no jurisdiction to perform an AA of the proposed developments. The case was heard by Holland J. in the High Court and by decision of 28 February 2024 [2024] IEHC 108, he upheld the decision of the Board granting development consent. In a detailed judgment, the trial judge in the High Court decided that in certain circumstances – indeed in most circumstances – conservation objectives will be necessary in order to carry out a valid AA but in the particular facts of this case, it was possible to have a valid AA without such objectives. This was because the scientific evidence showed that the QI – in this case the Whooper Swan – would not be affected by the purposed development irrespective of what conservation objectives had been set.
7. In that situation, the assessment correctly reflected the core function of an AA i.e. to ensure that the proposed development did not adversely affect the integrity of the site. The Board had concluded as a matter of reasonable scientific certainty that the project “*will not adversely affect the integrity of the site concerned*” for the simple reason that the off-site effect in question would require the physical presence of the Whooper Swan on the Knocknamona Windfarm Site and that presence has been discounted. As the High Court judge identified at paragraph 185 of his judgment: -

*“To put it crudely, if the Whooper Swan is not on the Knocknamona Windfarm Site it is impossible that it will collide with the Knocknamona Windfarm turbine rotors. If the identified risk will not transpire, it is impossible that it will adversely affect the integrity of the site no matter in what terms site-specific conservation objectives are belatedly adopted. In their absence from*

*the Knocknamona Windfarm Site there is no scenario in which, by reference to any such possible conservation objectives for the SPA, there could be a significant effect on the Whooper Swan.”*

8. In his judgment on leave to appeal to this Court [2024] IEHC 247, Holland J. observed that all accept, for the purpose of these proceedings, that the proposed windfarm will not adversely affect the integrity of the SPA (paragraph 3).
9. During the hearing in the High Court, the State respondents conceded that they had failed to fulfil their obligations under Article 4(2) of Directive 2009/147/EC (“the Birds Directive”) and Article 6 of the Habitats Directive by failing to establish the necessary site-specific conservation objectives and conservation measures in the Blackwater Callows SPA.
10. Leave is required to be given by the High Court judge in respect of an appeal to this Court under s.50A (7) of the Planning and Development Act 2000. Leave was granted on one question only as follows:

*“Are valid conservation objectives for a Special Protection Area a pre-requisite to the Board’s jurisdiction to carry out a valid Appropriate Assessment under Article 6(3) Habitats Directive and thus grant planning permission?”*

### **Relevant legal provisions**

11. This case concerns the correct interpretation of Article 6(3) of the Habitats Directive. The provisions of the Habitats Directive and the Birds Directive were transposed into Irish law by the European communities (Birds and Natural Habitats) Regulations 2011 (as amended) (S.I. No. 477 of 2011). Section 177 of the Planning and Development Act 2000 provides a definition of AA to be construed in accordance with s. 177V. Section 177V fleshes out the definition of AA and identifies the matters

that the competent authority shall take into account in carrying out an AA. Section 177V (5) obliges a competent authority to give notice of its determination in respect of an AA giving reasons for its determination. Insofar as the Blackwater Callows are concerned, Regulations were adopted in 2012 designating them as a special protection area (“SPA”) and identifying the special conservation interests, being the European Communities (Conservation of Wild Birds (Blackwater Callows Special Protection Area)) Regulations 2012 (SI No. 191 of 2012).

12. Infringement proceedings were commenced against Ireland by the European Commission whereby the Commission argued that Ireland was in breach for its failure to set site-specific detailed conservation objectives for 140 out of 423 SPA sites designated under the Habitats Directive and for failing to establish the necessary conservation measures which correspond to the ecological requirements of the natural habitat types in Annex I for any of the 423 sites designated. In *EU Commission v Ireland*, C-444/21, EU:C:2023:524, the CJEU held, *inter alia*, that by failing to define detailed site-specific conservation objectives for 140 of the 423 sites of Community importance at issue, Ireland had failed to fulfil its obligations under Article 4(4) of the Habitats Directive.

### **The grounds for the reference**

13. This reference concerns the consequences of the admitted failure by Ireland to set site-specific conservation objectives for the Blackwater Callows SPA. This Court is required to consider whether the High Court judge was correct in concluding that the development consent was lawful despite the fact that no site-specific conservation objectives were in place and the Board carried out the AA on the basis of a general conservation objectives for the site. The answer to that question depends upon the

interpretation that is adopted of Article 6(3) of the Habitats Directive. The relevant part of Article 6(3) is in the following terms:

*“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....”*

14. The only question posed by this appeal is whether, in the light of the words *“in view of the site’s conservation objectives”*, an AA can go ahead in the absence of a site-specific conservation objective or not. The appeal cannot be decided without determining the correct interpretation of Article 6(3). The answer to that question does not depend on domestic law and indeed does not even raise a question about the relationship between EU law and domestic law: it is a straight question of interpretation of EU law. Having regard to the arguments of the parties put forward at the hearing, and summarised below, this is not a straightforward question and is one where the assistance of the CJEU is required. It is likely that a determination of this issue by the CJEU will be of application outside Ireland.
15. The appellants argues that the decision by the Board was not a valid one since it is a jurisdictional prerequisite in making any decision on AA, when a project has been screened, that there be site-specific conservation objectives. It is said this flows from the wording of Article 6(3). The appellants argue that the words *“in view of the site’s conservation objectives”* mean that there must be existing conservation objectives, and that the assessment cannot be carried out in the absence of same. It is agreed between all of the parties save the notice party that the general objectives that did in fact exist were not sufficient as they were not site-specific, and that there were no

site-specific objectives. The notice party does not accept that the general objectives that existed for the Blackwater Callows SPA were not site-specific.

16. Next, the appellants point to the recent decision of the CJEU in *Elliniki Ornithologiki Etaireia & Ors v Ypourgos Esoterikon & Ors* C-66/23 EU:C:2024:733. One issue in that case was whether Article 4 of the Birds Directive, read in conjunction with Article 6(2) to 6(4) of the Habitats Directive, must be interpreted as meaning that measures for the protection, conservation and restoration of wild bird species and habitats and SPA's for which the Directive provides, apply only to those species which justify the classification of the site in question, or also to other species of birds requiring protection under Article 4 of the Habitats Directive which are present in those SPAs. At paragraph 42 the Court observed as follows: -

*“In that connection, as set out by the Commission, Article 6(3) and (4) of the Habitats Directive, which also applies to SPAs pursuant to Article 7 of that directive, under which Member States must carry out an ex ante assessment and submit for prior authorisation any plans or projects likely to have a significant effect on the sites concerned, specifies that the site's conservation objectives are to act as a mandatory reference point for the appropriate assessments required”.*

17. That decision was not before the High Court judge, because it was only given in September 2024. However, the appellants place considerable emphasis on it, noting that the CJEU has never before referred to conservation objectives as being a mandatory reference point. They say that the reference to a “*mandatory reference point*” is significant and means that an assessment cannot be carried out without such a reference point.



18. In response, the Board and the State on the other hand say that that passage is designed to indicate that, where conservation objectives exist, then they must act as a mandatory reference point, but that the passage does not in fact comment or is not directed to the question as to whether or not there must be conservation objectives to allow an AA to be carried out.
19. Finally, the appellants also point to the infringement proceedings taken by the Commission in respect of the Habitats Directive against Germany, Ireland and Greece, including in respect of a failure to adopt conservation objectives, *Commission v. Greece*, C-849/19, EU:C:2020:1047, *Commission v. Ireland* (referred to above) and *Commission v. Germany*, C-116/22, EU:C:2023:687. They argue that, in each of the three judgments, the CJEU has stressed the importance of the obligation to adopt conservation objectives.
20. The Board, the State parties and the developer on the other hand argue that there is no absolute jurisdictional preclusion on considering and carrying out an AA, even where conservation objectives do not exist. First, they point out that the European Commission in three iterations of its Guidance Note has made it clear that an AA can be carried out in the absence of conservation objectives, although it is accepted that this is far from optimal, and the preferred position is that there would be conservation objectives in place (see “*Commission note on setting conservation objectives for NATURA 2000 sites*” (2012); “*Managing NATURA 2000 sites The provisions of Article 6 of the Habitats Directive 92/43/EEC*” (2019); and “*Commission Notice Assessment of plans and projects in relation to NATURA 2000 sites*” (2021)). They rely upon the following passage from the 2021 Guidance as follows:

*“In the absence of conservation objectives, the appropriate assessment should assume as a minimum that the objective is to ensure that the habitat*

*types or habitats of species significantly present on the site do not deteriorate below the current level (at the time of the assessment) and that the species are not significantly disturbed”.*

21. They refer to that portion of the Guidance that identifies that the lack of site-specific conservation objectives jeopardises compliance with the requirements of Article 6(3), pointing out that observing something “*jeopardises compliance*” is notably not the same as saying that the absence of site-specific conservation means that Article 6(3) cannot be complied with.
22. Second, heavy reliance is placed by the State and the Board on Article 4(5) of the Habitats Directive. Article 4 sets out the process that culminates in the designation of sites as special areas of conservation (“SAC”). Those steps apply only to the sites covered by the Habitats Directive, but Article 7 of the Habitats Directive applies that regime to sites covered by the Birds Directive. The sequence is that the Member States propose a list of sites, indicating which natural habit types in Annex I, and which species in Annex II native to its territory the sites in question host. The list must be transmitted to the Commission within three years of the notification of the Directive. The Commission must establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member State’s lists within six years of the notification of the Directive. Those sites are known as candidate SACs. There is an obligation on the Member States to designate the candidate SACs as a SAC within six years of their adoption by the Commission. Article 6(1) makes it clear that when a Member State designates a SAC, they shall establish the necessary conservation measures. Those in turn derive from the conservation objectives.

23. Therefore, the obligation to adopt conservation objectives only comes into force at the date of designation. This means there is a period of time between the adoption of the candidate SACs and the adoption of conservation objectives for each of those SACs at the time of designation, that may be as long as six years. The question therefore arises as to what is to happen in the interim in relation to an AA. The answer to that is provided in Article 4(5), which provides that “*As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6 (2), (3) and (4).*” In other words, the AA must be carried out during the interim period between being a candidate SAC and becoming a designated SAC. However, as explained above, there is no obligation up until the date of designation to adopt conservation objectives. In those circumstances, the Board and the State contend that this must mean that the Directive has recognised that an assessment can be carried out without conservation objectives being in place. This must inform the interpretation of Article 6(3) because it means that the existence of a conservation objective is not vital to the carrying out of an AA.
24. In response, the appellants argue that a provision that is clearly designed to cover an interim situation cannot be used to inform the interpretation of Article 6(3). They observe that the time has long since gone by which Ireland ought to have adopted the conservation objectives. They treat Article 4(5) as an interim measure designed to ensure that, even at the candidate SAC stage, a site will be subject to an assessment but assert that its significance does not go beyond that.
25. Third, the State rely upon the Opinion of Advocate General Kokott in *Compagnie d’entreprises CFE SA v Région de Bruxelles-Capitale* and *Terre wallonne ASBL v Région wallonne*, C-43/18 and C-321/18, EU:C:2019:56, where she discussed the interim stage referred to above, and how an assessment could be carried out in the

absence of conservation objectives. They point in particular to her observations at paragraph 79, observing as follows: -

*“The designation of a special area of conservation may in particular influence the site’s conservation objectives. Article 4(4) of the Habitats Directive thus requires priorities to be established upon designation. It is also conceivable that the list of protected habit types and species or the geographical extent of the site will be modified upon designation”.*

26. It is said that these observations mean that it is possible to carry out an AA without having conservation objectives, because it is possible to look at the QIs for which the site has been protected. Reliance is also placed on the observations at paragraph 72 where Advocate General Kokott notes that the criteria on which the necessary assessment is based are the conservation objectives established for the site. The appellants counter that those observations are focused upon the period when sites are placed on the Community list, and this goes only to the interim period. The State and the Board also refer to *Commission v. Germany*, C-116/22, EU:C:2023:317 where Advocate General Capeta observed that *“the conservation objectives for which a particular site was selected to be protected as an SAC already existed prior to its former designation, at least to a certain degree”*.

27. Fourth, they rely on the findings of the High Court judge that the core aim of the Habitats Directive and Article 6(3) is to ensure that there is no doubt as to the effect on the integrity of the site, rather than overly focusing on the conservation objectives. They argue against excessive formalism and say that the Court must be aware of the dangers of overly relying on the wording of the text when interpreting it, and rather must look at the core objective of the Habitats Directives i.e. to preserve the integrity of sites. They note the interpretation advanced by them will not undermine that

approach in the instant case, given the fact that the appellants have not established that there is any species who will be adversely affected and do not so assert on the facts of this case.

28. The developer adopts the arguments of the Board and the State, and adds that given that the proposed development would not significantly disturb the QI species of the site or cause its habitat to deteriorate below its current level, it is impossible for the proposed development to adversely affect the integrity of the site no matter in what terms site-specific conservation objectives are belatedly adopted. It adds that the interpretation contended for by the appellants would stifle all development on the sites where Ireland has not adopted site-specific conservation objectives as it would preclude even an analysis as to whether an AA is required or not.

**Request for an expedited preliminary ruling**

29. The Court of Appeal requests the CJEU pursuant to Article 105 of the CJEU's Rules of Procedure to determine this reference pursuant to the expedited preliminary ruling procedure. As noted at paragraph 4 of the above reference, the windfarm was previously permitted, with the original permission being granted on 14 December 2016 under ref. no. PL93.244006. The permission the subject of these proceedings amended the 2016 permission. No construction has taken place on foot of that permission, or the amended permission. The 2016 permission is due to expire on 12 December 2026. If the reference is not determined pursuant to the expedited procedure, the notice party may be deprived of the benefit of the 2016 permission.
30. It is readily acknowledged that an impact upon the situation of an individual litigant where fundamental rights are not affected is unlikely to warrant the use of the expedited procedure. However, EU law requires the most expeditious judicial procedure available at national, regional and local level law for administrative and

judicial appeals in the context of the development of a renewable energy plant under Article 6(6) of Directive 2018/2001, as amended by Directive 2023/2413. Reference is also made to Commission Recommendation (EU) 2024/1343, para. 2, which requires inter alia, Member States to establish timeframes and lay down specific procedural rules with a view to ensuring the efficiency of the legal proceedings related to access to justice for renewable energy projects and the related infrastructural projects. Further, the question referred is one which potentially might impact on a significant number of appropriate assessments in Member States where site-specific conservation objectives have not been put in place for SPA's and/or SAC's, thus impacting upon the objectives of expedition referred to in Directive 2018/2001 as amended and Commission Recommendation 2024/1343.

**Question to be referred**

1. Are valid conservation objectives for a Special Protection Area a pre-requisite to the competent authority's jurisdiction to carry out a valid appropriate assessment under Article 6(3) of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora as amended (the "Habitats Directive") when considering an application for a grant of development consent?