

Date de réception : 28/09/2017

TO THE PRESIDENT AND THE MEMBERS OF
THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-164/17

PRELIMINARY REFERENCE
(REFERRING COURT: SUPREME COURT OF IRELAND)

BETWEEN

Registered at the Court of Justice under No.	1056308
Luxembourg,	26. 07. 2017
Fax/E-mail:	21.7.17
Received on:	25.7.17
Principal Administrator	

EDEL GRACE AND PETER SWEETMAN

Applicants

AND

AN BORD PLEANÁLA

Respondent

AND

ESB WIND DEVELOPMENTS LIMITED AND COILLTE

First and Second Notice Parties

AND

THE DEPARTMENT OF ARTS, HERITAGE AND THE GAELTACHT

Third Notice Party

WRITTEN OBSERVATIONS ON BEHALF OF THE RESPONDENT, AN BORD PLEANÁLA

Pursuant to the Protocol on the Statute of the Court of Justice of the European Union, An Bord Pleanála submits the following written observations on the question referred for preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union by Order of the Supreme Court dated 20th March 2017.

These written observations are made on behalf of An Bord Pleanála by Nuala Butler, Senior Counsel, and Fintan Valentine, Barrister-at-Law, instructed by Barry Doyle & Company, Solicitors, Marshalsea Court, 23 Merchants Quay, Dublin D08 C6XP, Ireland

1. Introduction

1.1 By Order dated 20th March 2017, the Supreme Court of Ireland referred the following question for a preliminary ruling:

“Where

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

CURIA GREFFE Luxembourg	
Entrée	25. 07. 2017

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

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

1.2 The request for a preliminary ruling is made in the context of judicial review proceedings by which the Applicants seek to quash a decision of the Respondent, An Bord Pleanála ("the Board"), of 22nd July 2014 to grant planning permission for a wind farm development of sixteen wind turbines and associated works in North County Tipperary. The question referred by the Supreme Court concerns the Applicants' primary ground of challenge, namely that the appropriate assessment carried out by Board before granting planning permission was in breach of the requirements of the Habitats Directive (Directive 92/43/EEC).

1.3 The Board carried out appropriate assessment pursuant to Article 6(3) and concluded that the proposed development would not adversely affect the integrity of the Slieve Felim to Silvermine Mountains Special Protection Area (designated under the Birds Directive, Directive 2009/147/EC), ("the SPA"). The Applicants contend that in coming to this conclusion, the Board wrongly took into account certain measures proposed by the First and Second Notice Parties (ESB Wind Developments Limited and Coillte; collectively, "the developer") in the Species Habitat Management Plan ("SHMP") submitted with the planning application. The Applicants contend that the said measures are 'compensatory' measures, which seek to compensate for an adverse effect on the integrity of the site arising from the proposed development, and that they

cannot therefore be taken into account in the context of appropriate assessment under Article 6(3). On the Applicants' analysis, the Board was in effect *compelled* to conclude that the proposed development would adversely affect the integrity of the SPA, and could not therefore grant planning permission unless it considered that the requirements of Article 6(4) were met.

1.4 The Board considered the relevant measures to be mitigation measures which formed an integral part of the development proposal, made their implementation a condition of the grant of planning permission (condition no. 6) and, having taken them into account, concluded that the proposed development would not adversely affect the integrity of the SPA. For the avoidance of doubt, the Board was of the view that the implementation of the measures would avoid any adverse effects on the integrity of the site, as opposed to merely reducing such effects, and references in these submissions to 'mitigation' or 'mitigatory' measures must be understood in that context.

1.5 The relevant measures have been comprehensively described in the Order of Reference of the Supreme Court of 20th March 2017, including in the Schedule thereto in which the Supreme Court sets out its findings of fact. In these circumstances, it is not proposed to repeat those established facts in these observations. However, for ease of reference, it is appropriate to summarise some of the key facts, as found to be established by the Supreme Court, on which the Board relies for the purposes of this reference.

2. Relevant facts as found by the Supreme Court

2.1 In this section, it is proposed to summarise the key relevant factual findings of the Supreme Court, making additional references, where appropriate, to corresponding extracts of the Board's Decision or the Board's Inspector's report.

- (i) As noted by the Supreme Court, the SPA was designated "*because of its suitability for hen harriers. It is not, in itself, a protected habitat*" (paragraph 1 of Schedule to Order of Reference). This is consistent with the conservation objective for this European site, which is "*to maintain or restore the favourable conservation condition of the bird*

species listed as Special Conservation Interests for this SPA: Circus cyaneus [breeding]". Thus, the conservation objective is specific to the species rather than to any particular habitat on the site. In this respect, reference is also made to the following extract on page 38 of the Inspector's report:

"I remind the Board that when considering the integrity of the SPA the objective is to protect the Hen Harrier. Thus the managed forest and restored bog areas are not of intrinsic value but are valued in relation to [the] favourable conservation status of the Hen Harrier."

- (ii) The site synopsis of the SPA provides that a mixture of forestry and open areas provides optimum habitat conditions for the hen harrier. A significant portion of the site is currently in use for commercial forestry. The Supreme Court notes that this "*only provides suitable habitat for the hen harrier during a portion of the life cycle of the conifer trees. Thus it is the case that if all trees were allowed, in the absence of commercial forestry management, to grow to maturity rather than being felled and replaced by new plantation, the habitat in the forested parts of the SPA would cease to be beneficial for the hen harrier. It would then, by natural growth, cease to fulfil the essential purpose for which the SPA was designated. The essential purpose is only fulfilled by the fact that the forest is in constant dynamic fluctuation as a result of commercial activity, so that the parts thereof which are, at any particular time, suitable as habitat for the hen harrier are in constant flux*" (penultimate paragraph of page 2 of Order of Reference). The maintenance or restoration of the favourable conservation condition of the hen harrier can therefore only be achieved by the *active forestry management* of the SPA, including the felling of trees so as to provide clearings and second rotation growth. As the Supreme Court states, "*a forest which is not thinned or harvested, but is simply left to mature, resulting in a closed canopy, will not be a suitable foraging area*" (paragraph 4 of Schedule).

- (iii) Pre-thicket, second rotation conifer plantation *“is now likely to provide the principal foraging habitat within the area for nesting hen harriers”* (paragraph 6 of Schedule).
- (iv) Taking into account the bases of the sixteen proposed wind turbines, the permanent direct loss of habitat, at 9 hectares, represents just over 1% of the total site area. However, the majority of this (eleven out of sixteen turbines) is located in areas *“currently covered by mature conifer forest which is not presently of value to hen harriers”* (paragraph 21 of Schedule). The Supreme Court states that it *“must be recalled that the habitat which will be lost would not necessarily form part of the suitable habitat at any particular time but would only form part of the habitat which might be suitable depending on the pattern of management of the commercial forestry adopted”* (third paragraph, page 4 of Order of Reference).
- (v) In line with the precautionary principle, the Supreme Court also took into account the potential displacement effect around the proposed wind turbines. Adopting a “worst case scenario” in this respect, *“it is assumed that foraging hen harriers will not come within 250m of a turbine. This would mean a total loss of foraging habitat during the lifetime of the project of 162.7 hectares”* (paragraph 22 of Schedule). This was also the approach adopted by the developer in the SHMP, and by the Board in carrying out appropriate assessment. At page 34 of her report, the Inspector records that the *“SHMP acknowledges that Hen Harriers may show avoidance around 250m of each turbine. A total area of 162.76 hectares must be replaced by mitigation measures.”*
- (vi) It is worth setting out the principal objectives of the SHMP, as found by the Supreme Court, in full:

“The principal objectives of the plan are:

- To restore areas of blanket bog and wet heath (the natural habitats of the area) in two specified locations within the site.

- To provide areas of optimum habitat for hen harriers, red grouse and other wildlife within the site during the lifetime of the project.
- To provide a corridor linking the areas of suitable bog habitat for hen harriers.”
(Paragraph 24 of Schedule).

(vii) To this end, 41.2 hectares are to be restored to blanket bog prior to the commencement of development. As 14.2 hectares of this will be within the 250m displacement areas, this equates, on the developer’s, the Board’s and the Supreme Court’s approach, to 27 hectares of suitable habitat for the hen harrier (paragraph 25 of the Schedule; see also page 34 of the Inspector’s report). Over the lifetime of the project, *“a further 137.3 hectares of second rotation forest, in Area D, will be subjected to “sensitive” management. Area D is currently largely closed canopy forest due to be felled in the periods 2019-2023 and 2024-2028. [...] The plan is to ensure that there will be 137.3 hectares of perpetually open canopy forest. The objective in relation to this area is to provide continuous foraging habitat and an ecological corridor between two areas of open bog”* (paragraph 26 of Schedule).

(viii) The Supreme Court summarises its findings of fact in relation to the SHMP in the following terms:

“32. It can be seen that the SHMP changes the management of a normal forest cycle by creating a continual cycle of felling and replanting aimed at providing continuous foraging habitat for the lifetime of the wind farm project.

33. It is a condition of the permission granted by the respondent Board that the SHMP be implemented in full, and that reports on compliance with it are submitted every three years, following consultation with the NPWS, to the planning authority. The reason given for this is the protection of the hen harrier.”

(ix) Crucially, on this basis, the Supreme Court states that it is *“satisfied on the facts that the management plan would, at a minimum, maintain, and is likely to enhance the amount of suitable habitat available”* for

the hen harrier (fourth paragraph of page 4 of Order of Reference; emphasis added).

- (x) This chimes with the approach taken by the Board's Inspector at paragraph 36 of her report, wherein she stated:

“In summary therefore I conclude that the relevant matter is that there is a proposed total mitigatory habitat of 164.3 hectares which compares favourably with the 162.76 hectares lost. Subject to the Board being satisfied that the management of the 137.3 hectares of perpetual open canopy forest under the SHMP will provide suitable Hen Harrier habitat then the Board can be satisfied that the development would be in accordance with the conservation objective for the SPA.”

- (xi) For the sake of completeness, when the Board, having considered the documents on file including the Natura Impact Statement, the SHMP, the submissions made, and the report and recommendation of its Inspector, completed its appropriate assessment, it said as follows in respect of this aspect:

“Subject to the implementation of the identified mitigation measures, including the implementation of the Species and Habitat Management Plan and in the context of the current pattern of foraging habitat availability, the Board is satisfied that no adverse long-term implications for Hen Harrier would arise, and the Board concluded that the proposed development, by itself, or in combination with other plans or projects, would not adversely affect the integrity of these European sites, in view of the conservation objectives for the sites.”

3. Overview of question to be resolved by the Court

- 3.1 The question referred for a preliminary ruling is a relatively net one, which involves the application of the established jurisprudence of the CJEU to a particular, and somewhat unusual, set of facts.
- 3.2 While the question is framed in terms of a ruling as to whether the measures in the SHMP can “*properly be regarded as mitigatory*”, the Board is conscious of the note of caution sounded by Advocate General Sharpston in her Opinion in **Case C-521/12, Briels v Minister van Infrastructuur en Milieu** (“*Briels*”) (paragraph 35) to the effect that the dividing line between a mitigation

measure and a compensatory measure, and that between a measure which can be taken into account in the Article 6(3) and one which cannot, is not necessarily identical:

“35. In the first place, therefore, two dividing lines must be drawn: between mitigation measures and compensation measures, and between measures which may be taken into account in the context of Article 6(3) of the Habitats Directive and those which can be taken into account only in the context of Article 6(4). It is not possible to assert, a priori, that those two dividing lines are identical.”

(Page 10)

- 3.3 While it is intended to continue to use the shorthand of ‘compensation’/‘compensatory’ versus ‘mitigation’/‘mitigatory’ measures in these observations, the crucial question, therefore, is whether the measures in the SHMP are measures which *can* be taken into account in determining whether the proposed development will or will not adversely affect the integrity of the SPA for the purposes of Article 6(3) of the Habitats Directive. At page 3 of the its Order of Reference, the Supreme Court usefully summarises this key question, based on a distillation of the case law to be discussed further below, as follows:

“In essence the distinction is between elements of the plan itself which are designed to minimize its effect to a sufficient extent that it can be said that the project does not adversely affect the integrity of the site, on the one hand, or measures which are separate and external to the plan itself but which may compensate, to a sufficient degree, for the effects of the development.”

- 3.4 The Board concluded that the measures in the SHMP fall into the former category. To explain why this conclusion was correct as a matter of European law, it is now proposed to examine in greater detail the existing jurisprudence of the CJEU on this issue, before applying that case law to the facts as found by the Supreme Court in this reference.

4. Decision of CJEU in *Briels*

- 4.1 The decision of the CJEU in *Briels*, broadly speaking, establishes that mitigation or mitigatory measures *can* be taken into account in determining whether a proposed development will or will not adversely affect the integrity

of a European site, but that ‘compensatory measures’ *cannot*. ‘Compensatory measures’ only come in to play at the Article 6(4) stage, to be implemented where a project which will adversely affect the integrity of a European site is to go ahead for reasons of overriding public importance.

4.2 In *Briels*, the Court was concerned with a proposed road development in the Netherlands which would entail the destruction of existing natural habitat type, molinia meadows (Annex I code 37.31). The relevant site had been designated as a Special Area of Conservation (“SAC”) in particular for the protection of *this habitat* type. There was a proposal to create a new area of molinia meadows of equal or greater size elsewhere within the SAC.

4.3 The Court in *Briels* noted that the conservation objective of the SAC “*consists in expansion of the area of that habitat and improvement of the quality thereof*” and concluded that the proposed development would have significant adverse effects for the existing area and for the quality of the protected natural habitat type, molinia meadows, due to drying out and acidification of the earth caused by increases in nitrogen deposits. In this regard, it distinguished between mitigatory measures and compensatory measures in the following terms:

“28. Consequently, the application of the precautionary principle in the context of the implementation of Article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site’s conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.

29. However, protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3).

30. This is the case of the measures at issue in the main proceedings which, in a situation where the competent national authority has in fact found that the A2 motorway project is liable to have – potentially permanent – adverse effects on the protected habitat type on the Natura 2000 site concerned, provide for the future creation of an area of equal or greater size of that habitat type in another part of the site which will not be directly affected by the project.

31. It is clear that these measures are not aimed either at avoiding or reducing the significant adverse effects for that habitat type caused by the A2 motorway project; rather, they tend to compensate after the fact for those effects. They do not guarantee that the project will not adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive.

32. It should further be noted that, as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future, a point made in paragraph 87 of the order for reference. Consequently, they cannot be taken into account at the procedural stage provided for in Article 6(3) of the Habitats Directive.”

(Pages 7-8; emphasis added)

4.5 Thus, mitigatory measures are those “*forming part of that project aimed at avoiding or reducing any direct adverse effects for the site*” whereas compensatory measures, “*are not aimed either at avoiding or reducing the significant adverse effects*”, but “*tend to compensate after the fact for those effects.*”

4.6 It is also worth noting what the Court said as to the meaning of ‘integrity of the site’, quoting from its previous decision in **Case C-258/11, Sweetman v An Bord Pleanála** (“*Sweetman*”):

“21 The Court thus held that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive (*Sweetman and Others* EU:C:2013:220, paragraph 39).”

(Pages 6-7 of the Judgment in *Briels*; emphasis added).

4.7 In the instant case, where the site was designated by reference to a species rather than a specific habitat, the same paragraph would read: “*the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are*

connected to the presence of the species whose preservation was the objective justifying the designation of that site”.

- 4.8 In her Opinion in the *Briels* case, Advocate General Sharpston also offers some guidance as to how to determine whether a measure is a mitigatory or compensatory measure:

“36. The basic semantic distinction between mitigation (or minimisation or reduction) and compensation (or offsetting) does not appear to me to be very controversial. In the context of Article 6(3) and (4) of the Habitats Directive, a mitigation measure must be one which lessens the negative effects of a plan or project, with the aim of ensuring, if possible, that (while some insignificant and/or transient effects might not be totally eliminated) the ‘integrity of the site’ as such is not adversely affected. A compensatory measure, by contrast, is one which does not achieve that goal within the narrower framework of the plan or project itself but seeks to counterbalance the failure to do so through different, positive effects with a view to, at the very least, avoiding a net negative effect (and, if possible, achieving a net positive effect) within a wider framework of some description.

37. In that light, I would classify the measures in issue in the main proceedings as being, in principle, compensatory measures. From their description, it appears to be accepted that the quality and/or extent of (some of) the existing molinia meadows in the Natura 2000 site may deteriorate as a result of the widening of the motorway. It seems that those meadows are at risk of deterioration through (long-term) increased nitrogen deposits due to increased motorway traffic and that, while no steps taken or planned are such as to provide an adequate reduction of that pollution or to prevent it from reaching the areas of molinia meadow nearest the motorway, new meadows are planned and are expected to lie beyond the reach of the increased pollution.

38. I cannot, therefore, agree with the Netherlands Government that the creation of new molinia meadows elsewhere within the Natura 2000 site is a mitigation measure; it is a compensatory measure.

39. However, that conclusion does not of itself mean that such a measure cannot be taken into account in the context of Article 6(3) of the Habitats Directive. That provision makes no mention of either mitigation or compensatory measures but concentrates on the result to be achieved – no adverse effect on the ‘integrity of the site’.

40. In the view of the Netherlands and United Kingdom Governments, the ‘integrity of the site’ must be considered as a whole, in terms of net loss or benefit: it does not matter that a particular habitat is lost in one part of the site, provided that at least an equivalent (and, preferably, a greater) area and quality of the same habitat is created elsewhere

within the site. Thus, particularly in the submission of the United Kingdom, a compensatory measure of that kind may be taken into account in the context of Article 6(3) of the Habitats Directive.

41. I can agree that the ‘integrity of the site’ should be viewed as a whole in the sense that it is its enduring essential character which must be considered, rather than insignificant and transient fluctuations in quality or area of a particular habitat. However, it seems to me that long-term deterioration of an existing natural habitat is something which necessarily concerns enduring essential character rather than insignificant and transient fluctuations. The same must apply where there is (or is likely to be) acceleration of an existing decrease in quality or a limitation of a possible increase in area (both of which are predicted in parts of the Natura 2000 site in the present case). In all cases, Article 6(3) requires the assessment to be made ‘in view of the site’s conservation objectives’ – which, in the present case, are expansion of the area of molinia meadow and improvement of its quality. Where deterioration of the kinds described cannot be ruled out, it must in my view be concluded that the integrity of the site, viewed in the light of its conservation objectives, is adversely affected.”

(Pages 10-11; emphasis added).

- 4.9 At a later stage of her Opinion, Advocate General Sharpston identified some criteria to identify those measures which could be taken into account at the Article 6(3) stage:

“49. [...] Consequently, it is not strictly necessary to consider what requirements would need to be met for a different type of measure to be taken into account in the context of Article 6(3). Nevertheless, it may be helpful to set out briefly the core of those requirements, particularly with regard to two aspects which have perhaps not yet been set out specifically in the Court’s judgments. Here, I am largely in agreement with the criteria put forward at the hearing by the Member States present.

50. On the one hand, not only is a mitigation measure necessarily bound up with the effect which it is intended to mitigate – so that it must concern the same site and the same habitat type – but it must, in order to be considered in the context of Article 6(3), form an integral part of the plan or project under consideration. It may, as the United Kingdom submitted, be included in the original plan or project or be inserted as a condition at a later stage (but before approval of the plan or project), to deal with predicted effects. The mere fact that a measure is likely to mitigate the effects of a plan or project is not, however, enough: it must be specific to that plan or project and not part of any independent framework.

51. On the other hand, as a corollary to the above, the measures must form a legally binding condition for the implementation of the plan or project if it is to be given approval. They must also (as, so to speak, the other side of the same coin) not be required if the plan or project does not receive approval. That does not mean that they may not be carried out unless the plan or project is approved (because they might, of course, serve some separate, useful purpose) but only that they cannot be regarded as specifically included in the plan or project if they are in fact the subject of some independent legal requirement.”

(Page 13; emphasis added).

4.10 A number of key principles can be extracted from the extracts of the Judgment of the Court and the Opinion of the Advocate General cited above. These are as follows:

- Mitigation measures which can be taken into account form part of the project and are aimed at avoiding or reducing any direct adverse effects for the site. They are to be contrasted with measures that compensate for those effects after the adverse effects have occurred.
- In determining whether the measures proposed avoid or reduce adverse effects, or are merely measures which compensate after the event for an adverse effect on the integrity of the site, the integrity of the site should be viewed as a whole and it is the enduring essential character of the site which is to be considered. In all cases, the assessment is to be made in view of the site’s conservation objectives. This is of particular importance in the instant case.
- In order that it can be taken into account at the Article 6(3) stage, a measure must form an integral part of the project, whether as originally proposed or inserted during the course of the decision-making process.
- It cannot be an integral part of the project where it forms part of an independent framework and/or would be implemented as part of an independent legal requirement even if permission for the project were not granted.
- Finally, the effects of the measure must be capable of being forecast with a reasonable degree of certainty. The need for certainty as regards

the benefits of protective measures before they can properly be taken into account in an assessment of the significance of any adverse effects on the integrity of the site has been subsequently emphasized by the Court in joined **Cases C-387/15 and 388/15 Hilde Orleans v Vlaams Gewest** (21st July 2016) (“*Orleans*”) and **Case C-142/16 Commission v Germany** (26th April 2017).

5. Application of principles to the question referred

5.1 Applying these principles to the facts of this case, it is submitted that the provision of replacement foraging habitat for the hen harrier clearly falls on a different side of the dividing line that the provision of new molinia meadows in *Briels*.

5.2 First, the conservation objective for the SPA is *specific to the species rather than any particular habitat on the site*. In *Briels*, by contrast, the conservation objective was specific to the meadows; the objective was expansion of the area of that habitat and improvement in the quality thereof. The habitat itself was protected; it made up the “constitutive characteristics” of the site. Inevitably, therefore, the destruction of any part thereof would adversely affect the integrity of the site.

5.3 Second, in the instant case, none of the habitat has intrinsic value such that it must be preserved as is. Neither the areas of commercial forestry nor the areas of bog and heath present on the site are of themselves of any particular environmental significance. It is the combination or mosaic of those habitats in circumstances where the areas of forestry are constantly rotated over the 40 year commercial forestry cycle that provides the habitat necessary for the species for which the site is designated. If left untouched, the existing habitat would, by natural growth, as stated by the Supreme Court “*cease to fulfil the essential purpose for which the SPA was designated*” (penultimate paragraph of page 2 of the Order of Reference). As noted by the Supreme Court, “*the habitat which is beneficial to the hen harrier, and thus which is essential to the maintenance of the integrity of the site, is itself a changing habitat which will, over time, be located in different parts of the site*” (third paragraph of page 3 of

the Order of Reference). It is important to appreciate that, even without the proposed development, the on-going changes to the site which produce habitat suitable for hen harriers result from the active management of the site for commercial forestry purposes.

5.4 Third, the integrity of the site must be considered as a whole in view of the site's conservation objective. The Board was required to consider whether the proposed development would adversely affect the enduring essential character of the site, *i.e.* whether it would reduce the protection offered by the site for the hen harrier and, in particular, its suitability as a foraging habitat. In this context, the loss of some unsuitable and some suitable habitat on one part of the site does not, of itself, necessarily comprise an adverse effect on the integrity of the SPA in view of the site's conservation objective because the habitat is always in a dynamic state of flux.

5.5 Here, the conservation objective is "*to maintain or restore the favourable conservation condition*" of the hen harrier. Of course, the conservation condition or status of such a species is defined, at Article 1(i), to mean "the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2". That status will be taken as "favourable" when:

"population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis".

5.6 The loss of some habitat on part of the site must be considered in the context of the proposed development as a whole, which includes active management of the proposed mitigatory habitat as part of the SHMP. That active management does not 'compensate', after the event, for adverse effects. Rather, it ensures that the commercial management of the forestry throughout the lifetime of the permission is such that the amount of suitable habitat for the hen harrier is, as

the Supreme Court found, maintained if not enhanced. The protective measures are thus aimed at avoiding any adverse effects for the hen harrier from the proposed development, by ensuring no net loss, and in fact providing for a net increase, of hen harrier foraging habitat. The species' conservation status is, consistent with the conservation objectives, therefore maintained. The protective measures therefore meet the first principle referred to in the bullet points above, arising from the Court's definition as to the distinction between mitigation and compensatory measures.

- 5.7 Fourth, turning to the criteria suggested by the Advocate General as to measures which can be taken into account under an Article 6(3) assessment (the third and fourth bullet points above), the proposed measures formed an integral part of the proposed development and were not part of any independent framework. In this context, the Board's Inspector was satisfied (at page 36 of her report) that in the SHMP, which formed part of the application for planning permission, the developer had committed itself to "*continuous management*" of the site to provide hen harrier habitat: "*the plan would apply over the duration of the operation of the wind farm and would consist of a range of phases of implementation including clearing, replanting and early cutting of forests to ensure maintenance of open canopy forest.*" This plan was then incorporated into the planning permission granted by the Board by virtue of condition no. 6 of the planning permission, which provides as follows:

"6. (a) The Species and Habitat Management Plan shall be implemented in full and managed over the lifetime of the wind farm.

(b) Over the lifetime of the wind farm, a report shall be submitted every three years for the written agreement of the planning authority, following consultation with the National Parks and Wildlife Service, setting out:-

(i) how compliance with the objectives of the Species and Habitat Management Plan have been achieved to date, and

(ii) details of the future measures to be undertaken to ensure continued compliance with the objectives of the Species and Habitat Management Plan.

(c) The proposed borrow pits and peat deposition areas shall be reinstated to the written satisfaction of the planning authority within two seasons following completion of construction works.

Reason: In the interest of protection of Hen Harrier.”

5.8 Fifth, as is clear from paragraphs 2 to 8 of the Schedule of the Supreme Court’s Order of Reference, the hen harrier’s preferences in terms of nesting and foraging habitats are well-understood, on the basis of scientific research and observation. Further the ability to achieve the requisite area of foraging habitat and the corridor between two areas of open bog (i.e. 137.3 hectares of open canopy forest) was not in doubt given that the area in question is already commercially managed forestry and will continue to be managed in accordance with the SHMP. Consequently, there was clearly sufficient material before the Board for it to be satisfied, with the requisite degree of certainty, that the measures set out in the SHMP would be effective in providing suitable habitat for the species and securing the ongoing preservation of the site at a conservation status favourable to, the hen harrier. The position is clearly different from that which pertained, for example, in Case C-142/16 Commission v Germany, where the effectiveness of the proposed fish ladder was not definitively established and could only be confirmed following several years of monitoring (see paragraph 37 and 38 of the Judgment of the Court).

5.9 For these reasons, the Board was entitled to conclude that the enduring essential character of the site as a site favourable to the conservation of the hen harrier would not be adversely affected by the proposed development.

6. Purpose of the Habitats Directive

6.1 Finally, where the Supreme Court has found, on the facts, that the active forestry management that would occur under the auspices of the SHMP would “at a minimum , maintain, and is likely to enhance the amount of suitable habitat available” for the hen harrier, any interpretation of the Habitats Directive which compelled the conclusion that this would nonetheless amount to an adverse effect on the integrity of the SPA would, it is submitted, be contrary to the very purpose of the Directive.

- 6.2 In the particular context of a dynamic habitat such as at issue in the present case, it would be excessively formalistic to take the view that the loss of *any* of that habitat would amount to an adverse effect of the integrity of the site. In this context, the present case is entirely different and distinguishable from what this Court considered in either *Sweetman* or *Briels*, which both concerned the destruction of some of the very habitat type for the protection of which the relevant sites were designated (limestone pavement in *Sweetman*, and molinia meadows in *Briels*).
- 6.3 Here, in assessing whether there is likely to be an adverse effect on the integrity of the site, it is the protection of the hen harrier which must be foremost in the competent authority's mind. To conclude that a proposed development, entailing an integral forestry management plan which will at least maintain and probably enhance the amount of suitable habitat available for the hen harrier, cannot proceed unless the requirements of Article 6(4) have been met could ultimately result in the conservation status of the protected species being in a less favourable position to that which would have obtained had permission been granted. This cannot be what the Habitats Directive intends. To rely, by analogy, on the comments of Advocate General Sharpston in the framework of the EIA Directive (see Cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and 135/09, Antoine Boxus and Ors. v. Région Wallonne, at page I-9735, paragraph 79, and page I-9736, paragraph 83), the Habitats Directive is not about formalism; it is concerned with providing effective protection for protected species and habitats.
- 6.4 In the instant case, the application of Article 6 is concerned with ensuring that the grant of planning permission for the proposed development will not compromise the protection of the hen harrier. The Supreme Court has found that the grant of planning permission will at least maintain and could well enhance the availability of the varied and dynamic habitat suitable for the hen harrier in the SPA. On the basis of these facts, and applying the principles which emerge from the Judgment of the Court and Opinion of the Advocate General in *Briels*, it is submitted that the Board was correct to take the measures of the SHMP, which formed an integral part of the project, into

account in conducting appropriate assessment, and that its conclusion that the proposed wind farm development would not adversely affect the integrity of the SPA was consistent with European law.

7. Conclusion

- 7.1 Accordingly, the Board submits that the answer to the question referred is that the measures as described in sub-paragraph (c) thereof can properly be regarded as 'mitigatory' and can properly be taken into account in determining, pursuant to Article 6(3) of the Habitats Directive, whether a project is likely to have an adverse effect on the integrity of a European site.

Filed on behalf of the Respondent (An Bord Pleanála) by Barry Doyle and Company, Solicitors the 21st day of July 2017.



Barry Doyle and Company
Solicitors for the Respondent (An Bord Pleanála)
23 Merchants Quay
Dublin D08 C6XP
Ireland