



EUROPEAN COMMISSION

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**TO THE PRESIDENT AND THE MEMBERS OF THE
COURT OF JUSTICE**

OBSERVATIONS

Submitted by the **EUROPEAN COMMISSION**, represented by Mr. Christoph Hermes and Mr. Emmanuel Manhaeve, members of its Legal Service, acting as agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels, and consenting to service by e-curia, in

Case C-164/17

Edel Grace and Peter Sweetman v An Bord Pleanála

on a request for a preliminary ruling pursuant to Article 267 TFEU by the Irish Supreme Court concerning the interpretation of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

I. INTRODUCTION

1. The Irish Supreme Court referred to the Court of Justice a question for preliminary ruling under Article 267 TFEU concerning the interpretation of Article 6(3) and (4) of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora¹ (hereinafter "the Habitats Directive"), with particular reference to the distinction between compensatory and mitigatory elements of a project
2. The case concerns the effects of a wind farm project on a special area of protection (SPA) under Directive 2009/147/EC on the conservation of wild birds² (hereinafter "the Birds Directive") that was designated for the hen harrier (*circus cyaneus*). The key question is whether certain positive measures set out in a plan accompanying the project exclude adverse effects on the integrity of the site.
3. The Court clarified the distinction between mitigation and compensation measures under Article 6(3) and (4) of the Habitats Directive in a number of recent judgments in cases *Briels*, *Orleans* and *Commission v Germany (Moorburg)*. Nevertheless, the Irish Supreme Court perceives a difficulty of interpretation because one feature of the site beneficial to the hen harrier is "dynamic" in the sense that it necessarily changes over time. The Commission considers that this "dynamic" feature of the site is not decisive for the characterization of the measures in question.

II. FACTS AND PROCEDURE

4. In the proceedings before the national courts, the claimants, Edel Grace and Peter Sweetman, challenged the decision of An Bórd Pleanála, an Irish planning authority, which granted permission for the development of a wind farm. The wind farm project comprises the erection of 16 turbines and related infrastructure. It is located in the Slievefelim to Silvermines Mountains Special Protection Area (thereinafter "the SPA").

¹ *Official Journal* L 206 , 22/07/1992 P. 0007 – 0050.

² *Official Journal* L 20, 26.1.2010, p. 7–25.

The site

5. The SPA³ was designated in 2007 to protect the hen harrier (*Circus cyaneus*), a species listed in Annex I of the Birds Directive. The hen harrier is a rare and vulnerable breeding species in Ireland with an estimated 108 to 157 breeding pairs in 2015.⁴ The designation of the SPA followed infringement proceedings in which the Commission inter alia claimed that Ireland failed to designate sufficient SPAs, including for the hen harrier. The Court ruled against Ireland on this and other claims under the Birds Directive in its judgment of 13 December 2007.⁵ The conservation objective of the SPA is “*to maintain or restore the favourable conservation condition*” of the hen harrier.⁶
6. According to the standard data form of the SPA, “*(a)pproximately half of the site is afforested, including both first and second rotation plantations and clear fell areas. Roughly one-quarter of the site is unplanted blanket bog and heath, with both wet and dry heath present. The remainder of the site is largely rough grassland that is used for hill farming. Some stands of deciduous woodland also occur, especially in the river valley*”.⁷ The standard data form for the SPA indicates that the site covers a surface area of around 20.913 ha. According to the Schedule of facts submitted by the referring court (hereinafter “the Schedule”), commercial coniferous forest makes up 12.078 ha (57,7%) of the surface area. The commercial forest management has an average life cycle of 40 years with the following phases: 1st rotation (open canopy, closed canopy, clear-fell), 2nd rotation (open canopy, closed canopy).
7. The standard data form for the SPA indicates that the site “*(s)upports c. 3% of the all-Ireland population of Circus cyaneus and among the top 5 most important sites in the country for the species. Habitat excellent for both nesting and foraging*

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

⁴ Ruddock, M., Mee, A., Lusby, J., Nagle, A., O'Neill, S. & O'Toole, L. (2016) The 2015 National Survey of Breeding Hen Harrier in Ireland. *Irish Wildlife Manuals*, No. 93, National Parks and Wildlife Service, Department of the Arts, Heritage and the Gaeltacht, Ireland, available at <https://www.npws.ie/sites/default/files/publications/pdf/IWM93.pdf> .

⁵ Judgment, C-418/04, *Commission v Ireland* [2007] ECLI:EU:C:2007:780.

⁶ See Conservation objectives for Slievefelim to Silvermines Mountains SPA, available at https://www.npws.ie/sites/default/files/protected-sites/conservation_objectives/CO004165.pdf .

⁷ Natura 200 Standard Data Form for site IE0004165, Slievefelim to Silvermines Mountains SPA, available at <http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=IE0004165> , section 4.1.

purposes".⁸ The standard data form gives the site an A-grade for the hen harrier identifying 7 permanent pairs on the site (see section 3.2 of the standard data form). This corresponds roughly to the information provided in the Schedule (at para. 2).

The hen harrier

8. According to this Schedule (paras. 3-5), hen harriers are primarily birds of open countryside that need extensive areas of suitable land over which to forage. Prime hen harrier foraging habitat is unplanted bog and heath. Hen harriers however also forage on hill farmland with rough grazing and rushy pasture, new forestry plantations where the trees are under 2 meters high and later stages of second rotation pre-thicket plantations where the trees are between 3 and 10 years old. The birds avoid intensive farmland, mature forest plantations with closed canopy and recently cleared forest plantations.

Impacts of the project

9. The area of the proposed wind farm covers around 832 hectares and is fully within the SPA. About half the area is closed canopy forest not currently suitable for hen harrier foraging. A quarter of the proposed development site is unplanted bog and heath. The remainder is pre thicket second rotation forest and rough grassland used for hill farming. From this information it would appear that at least half the site is currently suitable for hen harrier foraging and has potential for nesting too.
10. The Schedule identifies a range of potential impacts of the project on hen harriers within the site (paras. 19-23). The construction of the wind farm and related access road and repository areas will generate the direct loss of 9 hectares of habitat. This loss includes one hectare of cutover bog and wet grassland, which are currently suitable foraging habitats, and an additional two hectares of cutover bog that could recover to some extent in the medium to long term. The remaining 6 hectares mostly consist of mature conifer forest that would be of value to the hen harrier if or when replanted, which is excluded during the lifetime of the project. In addition it is assumed that an additional 162.7 hectares of foraging habitat will be unavailable during the lifetime of the project due to the displacement effect within 250 meters of the wind turbines. Aside from the loss of habitat, the construction activity is

⁸ Natura 200 Standard Data Form for site IE0004165, Slievefelim to Silvermines Mountains SPA, available at <http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=IE0004165> , section 4.2.

expected to generate disturbance to the species. Lastly, the risk of collision with the wind turbines has been determined to be low.

The SHMP

11. The project is accompanied by a species and habitat management plan (hereinafter "the SHMP") that seeks to address the adverse effects on the site through a number of positive measures (Schedule, paras. 24-33). First, the SHMP aims at restoring three currently planted areas as blanket bog and wet heath involving a total of 41.2 hectares (of which 14.2 hectares are located within 250 meters of a turbine). Secondly, the SHMP subjects another area of further 137.3 hectares of second rotation forest to "sensitive" management. This "sensitive" management foresees phased felling and replanting of the current closed canopy forest with the goal of ensuring 137.3 hectares of perpetually open canopy forest as foraging habitat for the hen harrier. Thirdly, the SHMP confines construction works to times outside the main breeding season. The SHMP also foresees monitoring of hen harriers in the vicinity of the project so that temporary closedown of turbines could be envisaged.

Procedure and question

12. The An Bórd Pleanála carried out an appropriate assessment within the meaning of Article 6(3) of the Habitats Directive and authorized the wind farm project. According to the national court file to which the Commission got access, the An Bórd Pleanála concluded that "[s]ubject to the implementation of the identified mitigation measures [...] the Board is satisfied that no adverse long term implications for hen harrier would arise [...]" (High Court, *Grace & anor v An Bord Pleanála & ors* [2015] IEHC 593, para 37). This decision followed the opinion of the Inspector who concluded that "the Board could be satisfied that the proposed development would not give rise to loss of hen harrier habitat within the site, and the measures set out in the SHMP would in fact mitigate the loss of the 162.7 hectares" (para 32).
13. In the proceedings before the national courts, the claimants argued that the envisaged replacement of lost foraging habitat could not be characterized as a mitigation measure under Article 6(3) of the Habitats Directive. The An Bórd Pleanála, on the other hand, considered that habitats within the site are not of intrinsic value, but are only valuable to the extent they constitute foraging habitat for the hen harrier. Given that the suitable foraging habitat of the hen harrier in the

site changes over time, one should assess whether the site as a whole continues to provide a sufficient amount of suitable habitat.

14. The High Court dismissed the claimants' challenge of the permit. On appeal, the Supreme Court referred the following question to the Court of Justice:

“Where

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

(b) the nature of the habitat which is beneficial for that species means that the part of the site which is beneficial will necessarily alter over time, and

(c) as part of a proposed development a management plan for the site as a whole (including changes to the management of parts of the site not directly affected by the development itself) is to be put in place which is designed to ensure that, at any given time, the amount of the site suitable as habitat as aforesaid is not reduced and indeed may be enhanced; but

(d) some of the site will, for the lifetime of the development project, be excluded from having the potential to provide appropriate habitat,

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

III. THE LEGAL FRAMEWORK

15. Article 6 of the Habitats Directive provides:

“(…)

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

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

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.”

16. Pursuant to Art. 7 of the Habitats Directive, the obligations arising under Article 6(2), (3), and (4) apply to classified SPAs.

IV. CONSIDERATION OF THE QUESTIONS REFERRED

17. The Supreme Court essentially wants to know whether Article 6(3) of the Habitats Directive must be interpreted as meaning that a project which has negative implications for a site because it excludes, during the lifetime of the project, some area from being suitable habitat for the species for which the site was designated, but which is accompanied by a plan which is designed to ensure that the overall amount of suitable habitat is not reduced and indeed may be enhanced, does not adversely affect the integrity of the site. In the view of the Supreme Court it may be relevant that some habitat on the site is "dynamic" in the sense that it is not constantly suitable for the species, but only from time to time.
18. Pursuant to Article 6(3) of the Habitats Directive, competent national authorities may only approve a plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. The Court has considered that "*[t]his is so when there is no reasonable doubt from a scientific point of view as to the absence of such adverse effects*".⁹ Based on the precautionary principle, the national competent authorities must therefore refrain from approving a plan or project if there remain any sort of scientific uncertainties as to the absence of adverse effects

⁹ Case C-142/16, *European Commission v Federal Republic of Germany* [2017] ECLI:EU:C:2017:301, para 33 and case-law cited therein.

on the integrity of the site.¹⁰ According to the Court, the integrity of the site will not be adversely affected if the site is preserved at a favourable conservation status, which "*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 [...]*"¹¹

19. By analogy, where a site is designated for the maintenance or restoration of a species, this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a species and species' habitat whose preservation was the objective justifying the designation of that site.

Integrity of the site

20. In the present case, the SPA was designated for the preservation of the Hen Harrier. Its conservation objective is to maintain or restore the favourable conservation condition of the Hen harrier.¹²
21. According to the Schedule and confirmed by the site synopsis,¹³ it is the foraging habitat, rather than nesting habitat, which limits the size of the population. Unplanted bog and heath were traditionally recognised as prime harrier habitat. More recently, the value for foraging of young conifer plantations on bog (trees under 2m high) was observed. The birds avoid intensive farmland, mature plantation and recently cleared plantation. Thus, 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.¹⁴

¹⁰ Case C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECLI:EU:C:2004:482, paras 57 and 58; Case C-258/11, *Sweetman and others* [2013] ECLI:EU:C:2013:220, para 41; Case C-521/12, *T.C. Briels and Others* [2014] ECLI:EU:C:2014:330, para 26.

¹¹ Judgment *Sweetman*, C-258/11, above n 10, para 39; Judgment *Briels* C-521/12, above n 10, para 21; Joined Cases C-387/15 and C-388/15, *Orleans and Others* [2016] ECLI:EU:C:2016:583, para 47.

¹² NPWS (2016) Conservation objectives for Slievefelim to Silvermines Mountains SPA [004165]. Generic Version 5.0. Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs, https://www.npws.ie/sites/default/files/protected-sites/conservation_objectives/CO004165.pdf

¹³ SITE SYNOPSIS, <https://www.npws.ie/sites/default/files/protected-sites/synopsis/SY004165.pdf>

¹⁴ Schedule, paras. 3-4.

Adverse effects on the integrity of the site

22. According to the information provided by the Supreme Court, the project entails a number of "potential impacts on hen harriers" within the site (see paras. 19-23 of the Schedule).
23. First, the turbines and related infrastructure will cause a direct permanent loss of 1 hectare of cutover bog and wet grassland and a direct temporary loss of additional 2 hectares of cutover bog (Schedule, para. 21). These habitats are currently suitable prime foraging habitats for the hen harrier.
24. Secondly, the project will entail the direct loss of 6 hectares currently covered by mature conifer forest. This habitat is not presently of value as foraging habitat to hen harriers, but would be so if or when replanted. During the lifetime of the project, it cannot become foraging habitat any longer (Schedule, para. 21).
25. Thirdly, an additional 162.7 hectares of foraging habitat will be unavailable during the lifetime of the project due to the displacement effect within 250 meters of the wind turbines (Schedule, para. 22)
26. Fourth, the construction activity is expected to generate disturbance to the species (Schedule, para. 20).
27. Lastly, the risk of collision with the wind turbines was determined to be low (Schedule, para. 23).
28. Consequently, in the Commission's view there can be no doubt that the project will have adverse effects on the integrity of the site.

No exclusion of adverse effects on the integrity of the site through the SHMP

29. The SHMP aims at restoring bog and heath land in other areas of the site, at providing "optimum habitat for hen harriers" within the site during the lifetime of the project, and at providing a corridor linking suitable bog habitats for hen harriers (Schedule, para. 24).
30. In order to achieve these goals,, the SHMP sets out the following positive measures:
 - Restoration of three currently planted areas as blanket bog and wet heath involving a total of 41.2 hectares (of which 14.2 hectares are located within 250 meters of a turbine) (Schedule, para. 25);
 - "sensitive" management of another area of further 137.3 hectares of second rotation forest (phased felling and replanting of the current closed canopy forest with the goal of ensuring 137.3 hectares of perpetually open canopy forest) (Schedule, paras. 26-29);

- confining construction works to times outside the main breeding season (Schedule, para. 30);
 - monitoring of hen harriers in the vicinity of the project to enable temporary closedown of turbines (Schedule, para. 31).
31. In the view of the Commission, these positive measures set out in the SHMP cannot exclude the negative effects on the integrity of the site identified above. In other words, the measures of the SHMP cannot be characterized as mitigatory for the purpose of Article 6(3) of the Habitats Directive.
32. The Court held in the *Briels* case that pursuant to Article 6(3) of the Habitats Directives, authorities may
- "tak[e] 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.*
- 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)."*¹⁵
33. This distinction between mitigating and compensatory measures was confirmed in the judgments in cases *Orleans*¹⁶ and *Commission v Germany (Moorburg)*.¹⁷
34. The Court has also repeatedly held that positive effects of measures which cannot be predicted with certainty in the moment of authorization of the project cannot be taken into account under Article 6(3) of the Habitats Directive. Thus, the Court held in *Briels*
- "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*

¹⁵ Judgment *Briels*, C-521/12, above n 10, paras. 28-29.

¹⁶ Judgment *Orleans*, C-388/15, above n 11.

¹⁷ Judgment *Commission v Germany*, C-142/16, above n 9.

account at the procedural stage provided for in Article 6(3) of the Habitats Directive."¹⁸

35. Similarly, the Court found in *Orleans*

"In the present cases, first, the adverse effects on the Natura 2000 site in question are certain, since the referring court was able to quantify them. Second, the benefits resulting from the creation of the nature reserves have already been taken into account in the assessment and in demonstrating the absence of significant adverse effects on the site even though the result of the creation of those reserves is uncertain, since it is not complete.

*Consequently, the circumstances of the cases in the main proceedings and those that gave rise to the judgment of 15 May 2014 in *Briels and Others* (C-521/12, EU:C:2014:330) are similar in so far as they involve, at the time of assessing the implications of the plan or project for the site concerned, the identical premise that future benefits will mitigate the significant adverse effects on that site, even though the development measures in question have not been completed."*¹⁹

36. This was confirmed in the case *Commission v Germany (Moorburg)* in which the Court stated that

*However, it is clear that the impact assessment itself did not contain definitive data regarding the effectiveness of the fish ladder, and merely stated that its effectiveness could only be confirmed following several years of monitoring.*²⁰

*In that regard, it should be noted that it is at the date of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (judgment of 26 October 2006, *Commission v Portugal*, C-239/04, EU:C:2006:665, paragraph 24 and the case-law cited).*²¹

37. The Court also emphasized the importance of properly distinguishing between mitigating and compensatory measures stating that *"the effectiveness of the protective measures provided for in Article 6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures – which are in reality compensatory measures – in order to circumvent*

¹⁸ Judgment *Briels*, C-521/12, above n 10, para 32.

¹⁹ Judgment *Orleans*, C-388/15, above n 11, paras 55-56.

²⁰ Judgment *Commission v Germany*, C-142/16, above n 9, para 37.

²¹ *Ibid*, para 42.

the specific procedures provided for in Article 6(3) and authorise projects which adversely affect the integrity of the site concerned."²²

38. Against this legal standard, only the third measure of the SHMP (i.e. the temporal restriction of construction works depending on the breeding season) qualifies as mitigatory. However, it only addresses one of several identified negative impacts (i.e. disturbance of the species resulting from construction activity) and can, therefore, not mitigate all identified negative effects on the site's integrity.
39. Importantly, there is no measure to mitigate the negative impact resulting from the direct permanent loss of 1 hectare of cutover bog and wet grassland and the direct temporary loss of additional 2 hectares of cutover bog. According to the Schedule (para. 4), this is the prime foraging habitat of the hen harrier. The first measure of the SHMP (i.e. restoration of blanket bog and wet heath areas) may compensate for that loss in other parts of the site but does not in any way reduce or avoid it.
40. This conclusion can be deduced from the *Briels* case in which the Court considered that the future creation of molinia meadows was designed to compensate but not to avoid or reduce the impact of the project on the existing molinia meadows²³ and the *Orleans* case in which the Court similarly considered that the creation of habitats and habitats of species in ecological core area was designed to compensate but not to avoid or reduce the impact on existing natural habitats.²⁴
41. The same goes for the direct loss of 6 hectares of mature conifer forest which will not develop into suitable foraging habitat (i.e. open canopy forest following felling and replanting) during the lifetime of the project. The second measure of the SHMP, the "sensitive" management of other forest areas, does not address this loss of potentially suitable foraging habitat. It merely seeks to ensure that globally there will be a certain amount of perpetually open canopy forest throughout the site.
42. Neither does the "sensitive" management of certain forest areas mitigate the negative impact resulting from the unavailability of additional 162.7 hectares of foraging habitat due to the displacement effect of the wind turbines.
43. The planned restoration and "sensitive" management are not designed to avoid or reduce these adverse effects. They rather seek to compensate for those effects. Indeed, the project will undoubtedly result in the direct loss of 9 hectares of suitable

²² Judgment *Briels*, C-521/12, above n 10, para 33; Judgment *Orleans*, C-388/15, above n 11, para 58.

²³ Judgment *Briels*, C-521/12, above n 10, para 39.

²⁴ Judgment *Orleans*, C-388/15, above n 11, para 64.

and/or potential habitat and the additional loss of 162.7 hectares of foraging habitat during the life of the project as a result of the displacement effect.

44. In addition, any benefits expected from the planned restoration of bog land or the envisaged "sensitive" management could not be predicted with the required certainty in the moment the authorities authorized the project. With regard to the envisaged "sensitive" forest management, this uncertainty is explicitly acknowledged with the inclusion of planting of certain tree species "on a trial basis" (at para. 29). Furthermore, any benefits expected from bog land restoration or "sensitive" management can only be expected at some point in the future whereas the loss of foraging habitat will be immediate and certain.
45. In this regard, the condition that the measures be implemented before negative impacts occur is not sufficient. Indeed, in *Orleans*, the Court specifically considered that hypothesis and stated that measures to be completed before the adverse effects *"but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on the integrity of that site, may not be taken into consideration in that assessment"*.²⁵ Thus, measures that are not completed before the appropriate assessment may not be considered in the context of Article 6(3).

No other assessment because of the "dynamic" nature of part of the site

46. According to the Supreme Court, *"the difficulty of interpretation which arises on the facts of this case stems from the fact that part of the habitat which is beneficial to the hen harrier, and thus which is essential to the maintenance of the integrity of the site, is itself a changing habitat which will, over time, be located in different parts of the site"* (Referral, p. 3).
47. In the view of the Commission, it is correct that part of the site is "dynamic" in the sense that forests only constitute suitable foraging ground for the hen harrier at certain phases of the forestry cycle. Whereas hen harriers forage on new forestry plantations where the trees are under 2 meters high and later stages of second rotation pre-thicket plantations where the trees are between 3 and 10 years old, they avoid mature forest plantations with closed canopy and recently cleared forest plantations.
48. Therefore, the envisaged "sensitive" forest management which seeks to ensure the availability of forest habitats that are suitable for the hen harrier is certainly positive

²⁵ *Ibid.*

and may even be a necessary conservation measure for the site pursuant to Article 6(1) of the Habitats Directive. However, this "sensitive" management does not qualify as a mitigating measure under Article 6(3) of the Habitats Directive for the reasons set out above, in particular since it is not designed to prevent the identified and certain loss of foraging habitat and because of the uncertainty of the benefits expected from the "sensitive" forest management.

49. Furthermore, the Commission would stress that important aspects of the site are not "dynamic" at all. This applies in particular to bog and heather areas which are the prime foraging habitat of the hen harrier, irrespective of any "dynamics" relating to forest management cycles.

V. CONCLUSION

50. For the above reasons, the Commission submits that the answer to the question referred by the Supreme Court should be:

"Article 6(3) of the Habitats Directive must be interpreted as meaning that a project which has negative implications for a site because it excludes, during the lifetime of the project, some area from being suitable habitat for the species for which the site was designated, and which is accompanied by a plan which is designed to ensure that the overall amount of suitable habitat is not reduced and indeed may be enhanced, adversely affects the integrity of the site, even if some habitat on the site is 'dynamic' in the sense that it is not constantly suitable for the species, but only from time to time."

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