[2023] IEHC 716

THE HIGH COURT
JUDICIAL REVIEW

[2023 No. 407 JR]

IN THE MATTER OF SECTIONS 21B AND 3 OF THE FORESHORE ACT 1933, AS AMENDED AND IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

IVAN TOOLE AND GOLDEN VENTURE FISHING LIMITED

APPLICANTS

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE AND THE MARITIME AREA REGULATORY AUTHORITY (BY ORDER)

RESPONDENTS

AND

RWE RENEWABLES IRELAND LIMITED AND THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

NOTICE PARTIES

(No. 7)

JUDGMENT of Humphreys J. delivered on Thursday the 21st day of December, 2023

1. This request for a preliminary ruling concerns 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 (OJ L 206 22.7.1992, p. 7).

2. The request is being made in proceedings challenging the grant of a five-year foreshore licence by the respondent to the first named notice party to undertake geotechnical and geophysical site investigations and ecological, wind, wave and current monitoring to provide further data to refine wind farm design, cable routing, landfall design and associated installation methodologies for the proposed Dublin Array offshore wind farm off the coast of counties Dublin and Wicklow, which was executed by licence agreement on 13th January, 2023.

Expedited procedure

3. The referring court is seeking the expedited procedure for the reference. Reasons for this request are set out in a separate judgment.

Anonymisation

4. The first-named applicant has requested the referring court to inform the CJEU that he does not wish his name to be anonymised for the purposes of the proceedings in the CJEU and therefore that he can be named by the CJEU including by way of the publication of materials or of the judgment of that court.

Legal context

European Union law

5. Article 4(3) TEU provides:

> "3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

6. Article 191 TFEU provides:

> "1. Union policy on the environment shall contribute to pursuit of the following objectives:
> - preserving, protecting and improving the quality of the environment,
> - protecting human health,
> - prudent and rational utilisation of natural resources,
> - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
>
> 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
> In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:
- available scientific and technical data,
- environmental conditions in the various regions of the Union,
- the potential benefits and costs of action of lack of action, - the economic and social development of the Union as a whole and the balanced development of its regions.
4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.
The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."

7. Article 6(3) of Directive 92/43 provides:

"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".

8. Annex IV para. 5(e) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ L 026, 28.1.2012, p. 1) (http://data.europa.eu/eli/dir/2011/92/2014-05-15) provides that assessment shall include:

"5. A description of the likely significant effects of the project resulting from, inter alia: ...
(e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources; ..."

9. Other relevant EU law material referred to by the parties includes:

(i) Judgment of 16 December 1981, *Pasquale Foglia v Mariella Novello,* C-244/80, ECLI:EU:C:1981:302 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61980CJ0244);

(ii) Judgment of 21 September 1999, *Commission v Ireland*, C-392/96, ECLI:EU:C:1999:431 (https://curia.europa.eu/juris/liste.jsf?language=en&num=C-392/96);

(iii) Judgment of 7 January 2004, *R. (Wells) v Secretary of State for Transport, Local Government and the Regions,* C-201/02, ECLI:EU:C:2004:12 (https://curia.europa.eu/juris/liste.jsf?language=en&num=C-201/02);

(iv) Judgment of 7 September 2004, *Waddenzee v Staatssecretaris van Land Bouw, Natuurbeheer en Visserij,* C-127/02, ECLI:EU:C:2004:482 (Grand Chamber), (https://curia.europa.eu/juris/liste.jsf?language=en&num=C-127/02);

(v) Judgment of 13 December 2007, *Commission v Ireland*, C-418/04, ECLI:EU:C:2007:780 (https://curia.europa.eu/juris/showPdf.jsf?text=%2522article%2B6%25283%2529%2522%2Band%2B%2522in%2Bcombination%2Bwith%2Bother%2Bplans%2522&docid=71717&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2554294);

(vi) Judgment of 25 July 2008, *Ecologistas en Acción-CODA,* C-142/07, ECLI:EU:C:2008:445 (https://curia.europa.eu/juris/liste.jsf?language=en&num=c-142/07);

(vii) Judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne,* C-41/11, ECLI:EU:C:2012:103 (Grand Chamber) (https://curia.europa.eu/juris/liste.jsf?num=C-41/11&language=EN);

(viii) Judgment of 7 November 2013, *Gemeinde Altrip*, C-72/12, ECLI:EU:C:2013:712 (https://curia.europa.eu/juris/liste.jsf?num=C-72/12&language=EN);

(ix) Judgment of 8 November 2016, *Slovak Bears II*, C-243/15, ECLI:EU:C:2016:838 (https://curia.europa.eu/juris/liste.jsf?language=en&num=C-243/15);

(x) Judgment of 26 April 2017, *Commission v Germany*, C-142/16, ECLI:EU:C:2017:301 (https://curia.europa.eu/juris/liste.jsf?num=C-142/16);

(xi) Judgment of 26 July 2017, *Comune di Corridonia and Others,* C-196/16 and C-197/16, ECLI:EU:C:2017:589 (https://curia.europa.eu/juris/liste.jsf?num=C-196/16&language=en) para. 43;

(xii) Judgment of 28 February 2018, *Comune di Castelbellino v Regione Marche and others,* C-117/17, ECLI:EU:C:2018:129 (https://curia.europa.eu/juris/fiche.jsf?id=C%3B117%3B17%3BRP%3B1%3BP%3B1%3BC2017%2F0117%2FJ&language=en) para. 3;

(xiii) Judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, ECLI:EU:C:2018:882 (https://curia.europa.eu/juris/document/document.jsf?text=&docid=207424&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2560748);

(xiv) Judgment of 12 November 2019, *Commission v Ireland,* C-261/18, ECLI:EU:C:2019:955 (Grand Chamber) (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2019%3A955);

(xv) Judgment of 28 May 2020, *Land Nordrhein-Westfalen*, C-535/18, ECLI:EU:C:2020:391 (https://curia.europa.eu/juris/liste.jsf?num=C-535/18);

(xvi) Judgment of 10 November 2022, *Dansk Akvakultur v Miljø- og Fødevareklagenævnet,* C-278/21, ECLI:EU:C:2022:864 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0278);

(xvii) Judgment of 6 July 2023, *Hellfire Massy Residents Association v An Bord Pleanála,* C-166/22, ECLI:EU:C:2023:545 (https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-166/22); and

(xviii) Opinion of Advocate General Kokott of 12 July 2023, *As 'Latvijas valsts* meži v Dabas aizsardzības pārvalde, C-434/22, ECLI:EU:C:2023:595 (https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-166/22).

10. Reliance was placed on European Commission guidance as follows:

(i) Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats Directive' 92/43/EEC (2000): https://op.europa.eu/en/publication-detail/-/publication/2c9f4a14-8f97-43ac-a274-4946c142b541/;

(ii) Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC (November 2001): https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf;

(iii) European Commission, Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report, (2017), in particular, part B, section 1.4.3: https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/b7451988-d869-4fee-80de-0935695f67f2/details?download=true";

(iv) Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats Directive' 92/43/EEC (2019): https://op.europa.eu/en/publication-detail/-/publication/11e4ee91-2a8a-11e9-8d04-01aa75ed71a1; and

(v) Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC (2021/C 437/01) [Brussels, 28.9.2021 C(2021) 6913 final, Commission notice]: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ%3AC%3A2021%3A437%3AFULL .

11. Reliance was placed on academic material, specifically Braaksma, Lolka & Haugsted, Thomas, "Unlawfully Authorised Projects under the Habitats Directive: Remediation at All Costs? Comment on the CJEU judgment of 10 November 2022 in Case C-278/21 AquaPri", *Journal for European Environmental and Planning Law*, 20 (2023) 95–113: https://www.researchgate.net/publication/369637873_Unlawfully_Authorised_Projects_under_the_Habitats_Directive_Remediation_at_All_Costs_Comment_on_the_cjeu_Judgment_of_10_November_2022_in_Case_C-27821_AquaPri.

Domestic law

12. The European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (https://www.npws.ie/sites/default/files/files/European%20Communities%20(Birds%20and%20Natural%20Habitats)%20Regulations%202011%20to%202021%20-%20Unofficial%20Consolidation%20(Updated%20to%2028%20July%202022)(1).pdf) transpose Article 6(3) of Directive 92/43 into Irish law and include the following provisions:

(i) Regulation 2(1) defines activity as follows:

"'activity' includes any operation or activity likely to impact on the physical environment or on wild flora or fauna or on the habitats of wild flora and fauna, other than ... [exceptions that do not apply here]."

(ii) Regulation 2(1) also defines public authority as follows
"'public authority' means—
(a) a Minister of Government, ..."

(iii) Regulation 27 provides:
"(2) Any public authority having or exercising functions, including consent functions, which may have implications for or effects on nature conservation shall exercise those functions in compliance with and, as appropriate, so as to secure compliance with, the requirements of the Habitats Directive and the Birds Directive and these Regulations.
(3) Public authorities, in the exercise of their functions, including consent functions, insofar as the requirements of the Habitats Directive are relevant to those functions, shall take the appropriate steps to avoid, in European Sites, 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 the Habitats Directive.
...
(5) Without prejudice to paragraphs (2), (3) and (4), every public authority in the exercise of any of its functions or responsibilities, shall—
(a) comply with the requirements of the Habitats Directive, the Birds Directive and these Regulations insofar as they may arise for consideration in the exercise of those functions,
(b) take the appropriate steps to avoid damage to European Sites through activities that may cause deterioration of natural habitats or to the conservation status of the species for which the sites have been designated, including such activities that take place outside the boundaries of the sites,
(c) take the appropriate steps to avoid disturbance of the species for which European Sites have been established, in so far as such disturbance could be significant in relation to the objectives of the Birds Directive or the Habitats Directive,
(d) outside special protection areas, strive to avoid pollution or deterioration of habitats within the meaning of the second sentence of Article 4(4) of the Birds Directive, ...
(6) Without prejudice to paragraphs (2), (3), (4) and (5), every public authority shall, as required, exercise its functions and take appropriate action, including enforcement action, within the remit of its statutory powers and responsibilities as well as in its activities, plans and projects, to secure the objectives of Article 6(2) of the Habitats Directive. ..."

(iv) Regulation 42 provides:
"42. (1) Subject to Regulation 42A, a screening for Appropriate Assessment of a plan or project for which an application for consent is received, or which a public authority wishes to undertake or adopt, and which is not directly connected with or necessary to the management of the site as a European Site, shall be carried out by the public authority to assess, in view of best scientific knowledge and in view of the conservation objectives of the site, if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site.
(2) A public authority shall carry out a screening for Appropriate Assessment under paragraph (1) before consent for a plan or project is given, or a decision to undertake or adopt a plan or project is taken.
(3) At any time following an application for consent for a plan or project, a public authority may give a notice in writing to the applicant, directing him or her to—
(a) furnish a Natura Impact Statement and the applicant shall furnish the statement within the period specified in the notice, and
(b) furnish any additional information that the public authority considers necessary for the purposes of this Regulation.
...
(6) The public authority shall determine that an Appropriate Assessment of a plan or project is required where the plan or project is not directly connected with or necessary to the management of the site as a European Site and if it cannot be excluded, on the basis of objective scientific information following screening under this Regulation, that the plan or project, individually or in combination with other plans or projects, will have a significant effect on a European site.
...

(11) An Appropriate Assessment carried out under this Regulation shall include a determination by the public authority under this Regulation pursuant to Article 6(3) of the Habitats Directive as to whether or not a plan or project would adversely affect the integrity of a European site and the assessment shall be carried out by the public authority before a decision is taken to approve, undertake or adopt a plan or project, as the case may be.
(12) In carrying out an Appropriate Assessment under paragraph (11) the public authority shall take into account each of the following matters—
(a) the Natura Impact Statement,
(b) any other plans or projects that may, in combination with the plan or project under consideration, adversely affect the integrity of a European Site,
(c) any supplemental information furnished in relation to any such report or statement,
(d) if appropriate, any additional information sought by the authority and furnished by the applicant in relation to a Natura Impact Statement,
(e) any information or advice obtained by the public authority,
(f) if appropriate, any written submissions or observations made to the public authority in relation to the application for consent for proposed plan or project,
(g) any other relevant information.
...
(16) Notwithstanding any other provision of these Regulations, a public authority shall give consent for a plan or project, or undertake or adopt a plan or project, only after having determined that the plan or project shall not adversely affect the integrity of a European site.
(17) Subject to any other provision of these Regulations—
...
(b) A public authority shall not adopt or undertake, or grant any consent for, a plan or project containing any conditions, restrictions or requirements purporting to—
(i) permit the deferral of the collection of information required for a screening for Appropriate Assessment or for an Appropriate Assessment or the completion of a screening for Appropriate Assessment or an Appropriate Assessment until after the consent has been given,
(ii) accept an incomplete Natura Impact Statement, or
(iii) permit or facilitate the avoidance of compliance with the conditions set out in Article 6(4) of the Habitats Directive.
...
(20) For the avoidance of doubt, notwithstanding the fact that the making, adoption and consent procedures relating to plans and projects which fall under the Planning and Development Acts 2000 to 2011 do not come within the scope of these Regulations, a public authority shall, pursuant to Article 6(3) of the Habitats Directive, take cognisance of such plans and projects in assessing any effects that might arise when such plans or projects are considered in combination with any activities, plans or projects for which the public authority is undertaking screening for Appropriate Assessment or Appropriate Assessment.
...
(23) For the avoidance of doubt, a plan or project referred to in this Regulation includes a plan or project that is within, partially within or outside a European Site.
(24) For the avoidance of doubt, in relation to a plan or project that is likely to affect more than one European Site or an area that is within more than one European Site, the screening for Appropriate Assessment and Appropriate Assessment shall address the impact of the plan or project, individually or in combination with other plans and projects, on each of the sites likely to be affected."

13. Section 3(1) of the Foreshore Act, 1933 https://revisedacts.lawreform.ie/eli/1933/act/12/revised/en/html provides as follows:

"3.—(1) If, in the opinion of the appropriate Minister, it is in the public interest that a licence should be granted to any person in respect of any foreshore belonging to the State authorising such person to place any material or to place or erect any articles, things, structures, or works in or on such foreshore, to remove any beach material from, or disturb any beach material in, such foreshore, to get and take any minerals in such foreshore and not more than thirty feet below the surface thereof, or to use or occupy such foreshore for any purpose, that Minister may, subject to the provisions of this Act, grant by deed under his official seal such licence to such person for such term not exceeding ninety-nine years commencing at or before the date of such licence, as that Minister shall think proper."

14. The combined effect of these provisions is that in circumstances such as apply in the present case, the first named respondent Minister was obliged to conduct an appropriate assessment in accordance with EU law as transposed in Ireland, prior to granting the impugned foreshore licence. In particular, under regulation 42(12)(b) of the 2011 regulations set out above, this involves a requirement that the appropriate assessment consider any other plans or projects that may, in combination with the plan or project under consideration, adversely affect the integrity of a European Site.

15. The Maritime Area Planning Act 2021 established the Maritime Area Regulatory Authority (MARA) and provided for a transfer of functions in the area to the MARA. Section 43 came into effect on 17th July, 2023 by virtue of the Maritime Area Planning Act 2021 (Commencement of Certain Provisions) (No. 2) Order 2023 (S.I. No. 369 of 2023).

16. The establishment day for the 2021 Act was determined to be 17th July, 2023, by the Maritime Area Planning Act 2021 (Establishment Day) Order 2023 (S.I. No. 372 of 2023). Chapter 1 of Part 9 of the 2021 Act, which includes s. 175, commenced on the establishment day by virtue of s. 1(6) of the 2021 Act. The electronic Irish statue book is incorrect in stating that s. 175 is:

> "Not yet commenced. Commencement order required under ss. 1(6), 41" (https://revisedacts.lawreform.ie/eli/1933/act/12/revised/en/html, accessed 18th December, 2023, archived at: https://web.archive.org/web/20231218125658/https://www.irishstatutebook.ie/eli/isbc/2021_50.html).

17. This is erroneous as to the commencement status and is also incorrect in implying that s. 1(6) envisages the making of an order – in fact s. 1(6) of the 2021 Act does not provide for commencement orders.

18. The Law Reform Commission version of the Foreshore Act 1933 states incorrectly of s. 1E that it is a:

> "Prospective affecting provision: section inserted by Maritime Area Planning Act 2021 (50/2021), s. 175, not commenced as of date of revision" (https://revisedacts.lawreform.ie/eli/1933/act/12/section/1E/revised/en/html, accessed 18th December, 2023, archived at: https://web.archive.org/web/20231218125743/https://revisedacts.lawreform.ie/eli/1933/act/12/revised/en/html#SEC1E).

19. The "date of revision" was the establishment day, so this involved an erroneous misunderstanding that further commencement was required.

20. Section 175 of the 2021 Act inserts a new s. 1E into the 1933 Act providing for powers of the MARA in relation to foreshore authorisations.

21. The position under the Act is that:

(i) any amendment of the licence would be a matter for the MARA (section 1E(5)(a) of the 1933 Act as inserted by s. 175 of the 2021 Act, and section 43(1)(i) of the 2021 Act); and

(ii) any reconsideration of the licence following remittal by the court would remain a matter for the Minister (because in such circumstances the licence would not have been finally determined and hence would fall outside the transfer of functions effected by section 1E(5)(a) of the 1933 Act as so inserted), subject to possible transfer of any remitted application to MARA by the Minister under amendments to be effected by section 244 of the Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023 (not yet commenced).

22. Order 28 rule 11 of the Rules of the Superior Courts (RSC) provides:

> "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected without an appeal:
> (a) where the parties consent, and with the approval of the Court, by the registrar to the Court,
> (i) on the application to the registrar in writing of any party, to which a letter of consent to the correction from each other party shall be attached or
> (ii) on receipt by the registrar of letters of consent from each party; or
> (b) where the parties do not consent, by the Court,
> (i) on application made to the Court by motion on notice to the other party or
> (ii) on the listing of the proceeding before the Court by the registrar on notice to each party."

23. Order 84 rule 27(4) RSC provides for directions regarding remittal of a decision following an order quashing such decision. It provides:

"Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."

24. Other relevant domestic law materials referred to by the parties include:

(i) *The State (Cussen) v. Brennan* [1981] I.R. 181 (Henchy J.) (https://app.vlex.com/#vid/805005557) ;

(ii) *Kelly v. An Bord Pleanála and Others* [2014] IEHC 400, [2014] 7 JIC 2503 (Finlay Geoghegan J.) (www.courts.ie/acc/alfresco/837c306b-fa79-4a11-ba66-74a3cc5b9e63/2014_IEHC_400_1.pdf/pdf);

(iii) *Connelly v. An Bord Pleanála,* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, [2018] 7 JIC 1701, (Clarke J.) (https://www.courts.ie/acc/alfresco/b5fc7d8a-a799-4446-95e3-37a2a7f5bdd8/2018_IESC_31_1.pdf/pdf);

(iv) *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888, [2019] 12 JIC 2017 (McDonald J.), (www.courts.ie/acc/alfresco/d20bcb2d-59c8-428f-895c-96dbc7416964/2019_IEHC_888_1.pdf/pdf);

(v) *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 610, [2021] 10 JIC 0406 (https://www.courts.ie/viewer/pdf/b4f5b37d-474d-4625-b7cb-7e5a87ff9c3c/2021_IEHC_610.pdf/pdf#view=fitH);

(vi) *Casey v. Minister for Housing*, *Planning and Local Government* [2021] IESC 42, [2021] 7 JIC 1606 (Baker J.) (https://www.courts.ie/viewer/pdf/97a66644-850d-4947-8fec-5ccd51059841/2021_IESC_42.pdf/pdf#view=fitH);

(vii) *Balscadden Road SAA Residents Association v. An Bord Pleanála* (No. 2) [2021] IEHC 143, [2021] 3 JIC 1217, (https://www.courts.ie/viewer/pdf/f097937d-a913-466c-9fde-57ff65ef0c74/2021_IEHC_143.pdf/pdf#view=fitH);

(viii) *Waltham Abbey Residents Association v. An Bord Pleanála* [2022] IESC 30, [2022] 2 I.L.R.M. 417, [2022] 7 JIC 0401, (Hogan J.) (https://www.courts.ie/viewer/pdf/2fedeabb-8284-4c0b-bf92-c785c21430c2/2022_IESC_30.pdf/pdf#view=fitH); and

(ix) *M.K. v. Minister for Justice and Equality* [2022] IESC 48, [2021] 4 JIC 1608 (O'Donnell C.J.) (https://www.courts.ie/viewer/pdf/4ebf1e17-e0b9-4c57-a71d-a5f95b9c39dc/2022_IESC_48_(O'Donnell%20CJ).pdf/pdf#view=fitH).

25. Reliance was placed on the following domestic guidance documents:

(i) Appropriate Assessment of Plans and Projects in Ireland, Guidance for Planning Authorities, published by the Department of Environment, Heritage and Local Government in December, 2009 (revised 2010) www.npws.ie/sites/default/files/publications/pdf/NPWS_2009_AA_Guidance.pdf; and

(ii) Office of the Planning Regulator, OPR Practice Note PN01, Appropriate Assessment Screening for Development Management (March 2021) www.opr.ie/wp-content/uploads/2021/03/9729-Office-of-the-Planning-Regulator-Appropriate-Assessment-Screening-booklet-15.pdf.

26. Reliance was placed on the following UK caselaw as persuasive authority for domestic law purposes:

(i) *Walton v. Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51 (https://www.bailii.org/uk/cases/UKSC/2012/44.html);

(ii) *R. (Champion) v. North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710 (https://www.supremecourt.uk/cases/docs/uksc-2014-0044-judgment.pdf);

(iii) *Canterbury City Council v. Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin) (https://www.bailii.org/ew/cases/EWHC/Admin/2019/1211.html).

Facts

27. The licence under challenge was sought under section 3 of the Foreshore Act 1933 on 1st October, 2021, to undertake geotechnical and geophysical site investigations and ecological, wind, wave and current monitoring to provide further data to refine wind farm design, cable routing, landfall design and associated installation methodologies for the proposed Dublin Array offshore wind farm off the coast of counties Dublin and Wicklow.

28. The application was accompanied by supporting documentation including a Natura Impact Statement and an Appropriate Assessment screening report which were annexes to a Supporting Information Report.

29. Two public consultation exercises took place in this matter.

30. The first consultation took place on foot of the application for the licence. That was advertised on 17th November, 2021 and took place from 18th November to 17th December, 2021. A copy of the application, relevant documents, maps and drawings were available for inspection at specified locations.
31. Some 17 submissions were made during the public consultation process as well as 8 submissions by prescribed bodies. Neither applicant made a submission at this stage.
32. The developer gave a response on 11th February, 2022 following the submissions from prescribed bodies.
33. It then submitted a more extensive 86-page response on the public submissions on 22nd March, 2022.
34. In May 2022, an independent environmental consultant (IEC), Hartley Anderson Ltd, prepared an appropriate assessment (AA) screening report to inform the Minister.
35. The Minister was also informed by an Environment Screening Stage Report prepared by the Department's Marine Advisor dated 20th June, 2022 which accepted that likely significant effects could not be discounted.
36. The Minister then published an AA Screening Determination on 20th June, 2022.
37. On foot of this, the Minister carried out a second public consultation exercise, which took place under regulation 42 of the European Communities (Birds and Natural Habitats Regulations) 2011 from 30th June to 29th July, 2022 in respect of the AA Screening.
38. The first named applicant made a submission on 30th June, 2022.
39. The second named applicant did not make any submission during the consultation.
40. There were further observations by certain prescribed bodies including the Commissioners of Irish Lights and Inland Fisheries Ireland, and a response to those submissions was submitted by the developer on 10th August, 2022.
41. There were 19 public submissions made at this juncture and the developer prepared responses, which were submitted to the Department on 16th August, 2022 and on 30th August, 2022.
42. A further report was prepared by Arup and Hartley Anderson in September 2022 and the Department's Marine Advisor also prepared a report with an attached AA Conclusions Statement.
43. The Marine Licence Vetting Committee (MLVC) reported in November 2022 and concluded that, with site specific conditions and taking account of the totality of the documentation on file and subject to compliance with specific conditions, the proposed works would not adversely affect fishing, navigation or the environment and were in the public interest, and that the proposed site investigation activities, individually or in combination with other plans or projects, will not adversely affect the integrity of European sites outlined in the report in view of the sites' conservation objectives.
44. A submission was made to the Minister accordingly, entitled Submission HLG 00537-22: Appropriate Assessment Determination on Foreshore Application FS007188 RWE Renewables Ireland Ltd., Site Investigations for the proposed Dublin Array offshore wind farm, which was approved by the Minister of State on 23rd November, 2022.
45. The AA did not consider the cumulative and in-combination effects of the project by reference to other projects that had been applied for but had not been consented. It only considered such effects by reference to projects where consent had already been granted.
46. Guidance documents from the European Commission and the Irish Government itself indicate that consideration of cumulative and in-combination effects for appropriate assessment purposes should include projects where consent has been applied for but not yet granted.
47. The impugned five-year foreshore licence itself was executed by licence agreement on 13th January, 2023.
48. Notice of the licence was published in Iris Oifigiúil on 27th January, 2023 pursuant to section 21A of the 1933 Act.

Procedural history

49. On 26th April, 2023, the present proceedings were issued.
50. On 22nd May, 2023, the referring court granted an interim stay on the foreshore licence impugned in the proceedings.
51. On 16th June, 2023, the referring court continued the stay on an interlocutory basis.
52. On 21st June, 2023, the referring court struck out the Minister of State in the Department of Housing, Local Government and Heritage as a respondent, without objection, on the basis that the Minister as first named respondent is the legal entity and is responsible in law for the acts of the Minister of State.
53. On 3rd July, 2023, the referring court dismissed the case save as to two points and refused the application to dismiss those or to reduce them to declaratory issues only.

54. On 13th July, 2023, one of the two remaining points was addressed by making an order of *mandamus* regarding the amendment of the licence. The other point regarding inadequate appropriate assessment was dealt with by deciding in principle to make a reference to the CJEU.
55. On 10th August, 2023, the applicants appealed to the Court of Appeal in relation to the partial dismissal of the case and in relation to the order of *mandamus* as opposed to quashing the decision [CA Record No. 2023 203 and 204]
56. On 27th October, 2023 the referring court set out the reasons for the request for the expedited procedure before the CJEU.
57. On 31st October, 2023, the stay was maintained in place until further order with certain limited amendments. However the matter was then delayed because an issue arose as to the need to involve the Maritime Area Regulatory Authority (MARA) as a party to the proceedings.
58. On 20th November, 2023 the referring court joined the MARA as a notice party.
59. On 27th November, 2023 the referring court gave directions for the parties to clarify their positions on the outstanding issues.
60. On 11th December, 2023 the matter was heard further. The referring court was satisfied that MARA had outlined the correct domestic law position regarding its role, and amended the order of mandamus of 13th July, 2023, under the slip rule (Order 28 rule 11 RSC) and/or the inherent jurisdiction of the court to correct an error, reflecting the transfer of functions by operation of law, and added the MARA as a second named respondent. The referring court amended the wording of the order of mandamus so that it was directed to the MARA rather than the Minister. The applicant complained that the MARA had no legal obligation, but the obligation was originally that of the Minister to rectify the infirmity in the wording of the licence. Such an obligation was transferred by operation of law to the MARA.
61. On 15th December, 2023, the State appealed to the Court of Appeal [CA Record No. 2023 317] against the decision to maintain the stay. The notice of appeal complains about the departure from the normal onus of proof being on an applicant, but oddly without much meaningful engagement with the special factors which the referring court considered warranted such a departure here, namely the threshold of removal of scientific doubt under Directive 92/43, the context of the project taking place partly in a European site, the demonstrated error in the licence insofar as its wording did not match the reasoning, the likely error, in the view of the referring court, in the conduct of the AA process, and the express admission by the State that there would need to be a further decision after the reference as to the lack of adverse effects on a European site, in which the onus would be on the State, if the CJEU agrees that the AA was defective. This all occurred in the context where the order appealed against was the third examination of the stay issue by the referring court and the State's second attempt to dislodge that order.
62. The State also complains that a consideration of the issues relevant to the stay on an assumption that all questions referred should provisionally be answered in a sense favourable to the applicant would be an "unreasonable burden" (ground of appeal 3.7). However when the referring court raised that option in the judgment of 31st October, 2023, that was *obiter* by definition since it was anticipating an application that had not been made. Since that judgment, the referring court has considered the issue in the context of the judgment and order for reference and in the light of submissions made, and on such further consideration the referring court is now suggesting replies to the referred questions below that take an approach that only reasonable steps to identify other relevant projects are required. It follows logically from the foregoing that if any further application to vacate the stay pending the CJEU judgment were to be made, it should be considered on assumptions favourable to the applicant only insofar as those reflect the referring court's view of the reasonable requirements imposed by European law as represented by the proposed answers. That is not impractical and nor does it impose an unreasonable burden. Nor is the State required to conduct its own AA-type process first – that was only a suggestion. Obviously the referring court's view will be superseded by the CJEU judgment in due course but, subject to any order of the appellate courts to the contrary, the proposed answers could be a context for dealing with any injunctive issue in the meantime.
63. If, on the other hand, the State's objection is to the concept of any onus being on it at all when it comes to the discharge of the stay, that appears hard to reconcile with the concession referred to above, and it is possible, depending on whether the issue returns to the referring court in some form, and subject to developments in appellate courts, that there might be a necessity to refer further issues to the CJEU in these proceedings in that regard. If that arises the referring court will communicate with the CJEU in the appropriate format.
64. On 18th December, 2023, the referring court dealt with a further issue that had arisen that delayed matters which was that the error referred to above to the effect that the Law Reform Commission had mis-stated on their website that the relevant legislation had not come into force, but the correct position to the contrary was agreed by all parties.

65. The State's appeal is listed for mention on 12th January, 2024. The applicants' appeals are listed for hearing on 16th January, 2024. At the present time none of these appeals have created results that affect the necessity for or the terms of the reference, but if that changes, the referring court will inform the CJEU forthwith in the appropriate format.

66. In circumstances set out above, the referring court now decides to formally stay the substantive finalisation of the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling.

67. The MARA decided not to get involved in proposing answers to the various questions. The State response covers both the respondent and the second named notice party.

First question

68. The first question is:

> **Do the words "in combination with other plans or projects" in Article 6(3) of Council Directive 92/43 include plans or projects for which an application for approval or consent has been submitted but not determined?**

69. The applicants' proposed answer is Yes. The rationale for taking into account the in-combination effects of pending projects is that, although it is possible that they will be refused consent (in which case they will pose no risk to the integrity of Natura 2000 sites), there is a significant risk that they will be granted, in which case they have the potential to give rise to in-combination effects which pose a risk for the integrity of Natura 2000 sites. The requirement to take into account projects which are proposed but not yet determined is consistent with the precautionary principle under Article 191 TFEU and is consistent with Member State's obligations under Article 6(2) of the Habitats Directive to 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.

70. The State's proposed answer is that Article 6(3) of Directive 92/43/EEC must be interpreted, by analogy with the provisions of Directive 2011/92/EU and in particular Article 5(1) and Annex IV, paragraph 5(e) thereof, to mean that the obligation to carry out an appropriate assessment of the implications for a site of project in combination with other plans or projects requires the competent authority to take into account the implications of the project on the conservation objectives of the site, in combination with the effects of other existing and/or approved plans or projects, but does not require that assessment to consider the effects of other plans or projects which are neither existing nor approved. To the extent that non-binding Commission guidance provides that the in-combination provision pursuant to Article 6(3) of the Habitats Directive concerns other plans or projects that are proposed (i.e. for which an application for approval or consent has been submitted but not determined), these guidelines adopt an overly prescriptive approach that go beyond the requirements of Article 6(3), are contrary to legal certainty and are erroneous as a matter of law.

71. The first named notice party did not offer a specific wording for the answer but its position appeared to be broadly similar to the State's position to the effect that the question should be answered No.

72. The referring court's proposed answer is Yes. The European Commission's guidance has been clear and consistent and such an interpretation gives effect to the purposes of Directive 92/43 which is to ensure the protection of the integrity of European sites. Subject to the separate question of plans and projects not yet submitted for consent, which is addressed in a later question, the position should be declared to be as in Commission guidance (p. 43) that "the in-combination provision concerns other plans or projects that have been already completed, approved but not yet completed, or submitted for consent."

73. The relevance of the question is that if the answer is Yes then the AA here was not carried out in a lawful manner because it did not take account of projects where consent had been applied for but not yet granted as of the date of the licence.

Second question

74. The second question is:

> **If the answer to the first question is Yes, does Article 6(3) of Directive 92/43 have the effect that appropriate assessment by a particular competent authority of the implications for a European site of a proposed plan or project the subject matter of a development consent requires that the plan or project be assessed cumulatively or in combination with other plans or projects for which an application for permission has been made to the same competent authority but not determined, limited to other plans and projects which are drawn to the attention of the competent authority for the development consent in question for the purpose of such an assessment, as opposed to plans or projects of which that competent authority is or ought to be aware irrespective of whether they are drawn to its attention for the purpose of such an assessment?**

75. The applicants' proposed answer is, subject to a caveat referred to below, that Article 6(3) of Directive 92/43 has the effect that appropriate assessment by a particular competent authority of the implications for a European site of a proposed project the subject matter of a development consent requires that the project be assessed cumulatively or in combination with other plans or projects for which an application for permission has been made to the same competent authority but not determined, in relation to projects of which that competent authority is or ought to be aware irrespective of whether they are drawn to its attention for the purpose of such an assessment. It can be noted that the applicants' answer here and elsewhere was subject to questioning the formula that projects to be considered should be limited to those of which the competent authority is or "ought to be" aware, but that formula only connotes the extent of legal obligation and does not provide an excuse for unawareness that could reasonably have been avoided.

76. The State's proposed answer is that strictly without prejudice to the State's primary position that the first question should be answered in the negative, the respondent submits that if the first question is answered in the affirmative, in the interests of legal certainty, a competent authority should not be required to consider pending projects other than those specifically drawn to the attention of that competent authority (including pending projects before other competent authorities) for the purposes of an in-combination assessment of pending projects pursuant to Article 6(3) of the Habitats Directive. The in-combination effects assessment in an appropriate assessment ought not to be an open-ended exercise requiring an administrative decision-maker to make extensive inquiries about other potential pending projects which may have an in-combination effect with the project for which consent is sought. To hold otherwise would render this a Sisyphean task that can never be completed, since the ongoing flow of new applications for pending projects would trigger in-combination effect assessment obligations anew, even in respect of applications for pending projects about which the decision-maker might have no actual or constructive knowledge, and the system would become unmanageable.

77. The first named notice party did not offer a specific wording for the answer.

78. The referring court's proposed answer is No. The competent authority is obliged to take reasonable steps to identify other projects relevant to the assessment of cumulative and in-combination effects, but only reasonable steps. Whether such steps have been reasonable in any given case can have due regard to all the circumstances including the nature of matters brought to the competent authority's attention. The position is as reflected in Commission guidance at pp. 44-45:

> "Tools to collate cumulative impacts, like databases recording the projects and plans to be considered, are helpful to streamline the assessment of cumulative effects. For instance, getting an overview of different activities is greatly facilitated if there is an up-to-date national or regional database, preferably including a dynamic map, which enables users to search all projects, including those still in the planning phase. In order for those databases to be useful for the appropriate assessment, competent authorities should aim to maintain the relevant documents online (e.g. impact assessment, mitigation measures introduced or conditions set for approval) also after permits are granted.
>
> Competent authorities (nature conservation, sectoral) should be consulted in order to collect information about the other plans/projects that should be considered during the assessment. Competent authorities can also contribute or support the assessment of cumulative impacts, as they have the best overview and knowledge about other activities across wider areas. They can also collect all relevant information and provide this to the project developers and consultants. The assessment of cumulative impacts may draw on information from a variety of sources including environmental studies and programmes, strategic, sectoral, and regional environmental assessments, project level environmental assessments, cumulative impact assessments from similar situations and targeted studies on specific issues. Expert advice can also be a good source of information on cumulative effects."

79. The relevance of the question is that that if the AA is held to be defective and is quashed by the referring court, the court will most likely be required to consider the question of remittal and of giving directions under national law (under O. 84 r. 27(4) of the Rules of the Superior Courts) by reference to which the remittal will take place. The purpose of the question is to enable legally correct directions to be given to the decision-maker so that such a remittal would be conducted in accordance with European law. It is necessary for the court to be able to direct the competent authority as to what projects to take into account.

Third question

80. The third question is:

> **If the answer to the first question is Yes, does Article 6(3) of Directive 92/43 have the effect that appropriate assessment by a particular competent authority of the implications for a European site of a proposed plan or project the subject matter of a development consent requires that the plan or project be assessed**

cumulatively or in combination with other plans or projects for which an application for permission has been made to a different competent authority but not determined, limited to other plans and projects which are drawn to the attention of the first-mentioned competent authority for the development consent in question for the purpose of such an assessment, as opposed to plans or projects of which that competent authority is or ought to be aware irrespective of whether they are drawn to its attention for the purpose of such an assessment?

81. The applicants' proposed answer is, subject to the caveat referred to above, that Article 6(3) of Directive 92/43 has the effect that appropriate assessment by a particular competent authority of the implications for a European site of a proposed project the subject matter of a development consent requires that the project be assessed cumulatively or in combination with other plans or projects for which an application for permission has been made to a different competent authority but not determined, in relation to projects of which that competent authority is or ought to be aware irrespective of whether they are drawn to its attention for the purpose of such an assessment..

82. The State's proposed answer is as set out under the second question.

83. The first named notice party did not offer a specific wording for the answer.

84. The referring court's proposed answer is as set out under the second question.

85. The relevance of the question is as set out under the second question.

Fourth question

86. The fourth question is:

If the answer to the first question is Yes, does Article 6(3) of Directive 92/43 have the effect that appropriate assessment by a particular competent authority of the implications for a European site of a proposed plan or project the subject matter of a development consent requires that the plan or project be assessed cumulatively or in combination with other plans or projects for which an application for permission is proposed but has not yet been made to any competent authority?

87. The applicants' proposed answer is that Article 6(3) of Directive 92/43 has the effect that appropriate assessment by a particular competent authority of the implications for a European site of a proposed project the subject matter of a development consent requires that the project be assessed cumulatively or in combination with other plans or projects for which an application for permission is proposed but has not yet been made to any competent authority. In response to the notice party's claim that the question is hypothetical, the applicant submits that this question is not hypothetical in circumstances where, in the event that the CJEU were to decide the primary question in relation to whether there is a requirement under Article 6(3) of the Habitats Directive to consider pending projects, a potential outcome of the proceedings herein is that this Court would grant *certiorari* quashing the respondent's decision and remitting the matter to the respondent to carry out an appropriate assessment "in accordance with law" and in accordance with the Court's directions in that regard. In circumstances where (a) EU Commission Guidance and Domestic Guidance recommends against consideration of such projects and (b) the issue raised in the fourth question is not acte clair, the fourth question is a necessary question to ensure that the decision to be made on remittal is carried out on a lawful basis and in accordance with the requirements of Article 6(3).

88. The State's proposed answer is as set out under the second question. As regards the notice party's claim that this question and the fifth question are hypothetical, the State's answer is that if the Court saw fit to order *certiorari* of the licence and remit the matter to the respondent with directions as to the scope of pending projects to be considered for the purposes of Article 6(3) of the Habitats Directive, these questions would be potential issues in such remittal, and it is in the interests of legal certainty and procedural economy that these questions would be resolved as part of the reference being made to the CJEU in the proceedings. The questions concerned are unlikely to add appreciably to the time taken to resolve the reference, while, conversely, a failure to refer the questions now risks further uncertainty and delay at a later stage, in relation to a project that is strongly in the public interest for the reasons identified in the referring court's request for the expedited procedure. In the circumstances, it is respectfully submitted that the referring court is free to refer all of the questions.

89. The first named notice party's proposed answer is that the question goes beyond the scope of the pleadings and, therefore, is moot and hypothetical, the issue arising in those questions was not pleaded, did not arise on the facts, no evidence was adduced in respect thereof, was not the subject of submissions before the Court and was previously out ruled.

90. The referring court's proposed answer is Yes. It is perfectly workable and consistent with the objectives of Directive 92/43 for the consideration of in-combination and cumulative effects to be carried out in a way that takes into account projects for which a formal application for permission has not been made, subject to the question of whether the competent authority has taken reasonable

steps to become aware of such projects or in particular whether they have been drawn to the attention of the competent authority.

91. The relevance of the question is as set out under the second question. The question is not hypothetical. Insofar as the questions were not ones raised on the pleadings, that has the effect that the applicants will not be entitled to a declaration in this regard (consistent with the judgment of 15 June 2023, *Eco Advocacy*, C-721/21, ECLI:EU:C:2023:477). The first named notice party's concerns would all be valid if the issue was whether the applicants could obtain substantive relief by reference to these points. But that does not affect the relevance and necessity of such questions to the question of the terms of a remittal order. The legitimacy of the questions is reinforced, if such be necessary, by the fact that these were issues raised by the State as matters to be referred to the CJEU. The jurisprudence on hypothetical questions such as the judgment of 16 December 1981, *Pasquale Foglia v Mariella Novello,* C-244/80, ECLI:EU:C:1981:302 is thus simply not relevant here.

Fifth question

92. The fifth question is:

> **If the answer to the fourth question is Yes, should such an assessment be carried out in a way that is limited to other plans and projects which are drawn to the attention of the competent authority for the development consent in question for the purpose of such an assessment, as opposed to in relation to proposed plans or projects of which that competent authority is or ought to be aware irrespective of whether they are drawn to its attention for the purpose of such an assessment?**

93. The applicants' proposed answer is that, subject to the caveat referred to above, such an assessment should be carried out in relation to proposed projects of which that competent authority is or ought to be aware irrespective of whether they are drawn to its attention for the purpose of such an assessment. The applicant's refutation of the claim that the question is hypothetical is as per the fourth question.

94. The State's proposed answer is as set out under the second question. The State's refutation of the claim that the question is hypothetical is as set out under the fourth question.

95. The first named notice party's proposed answer is that the question goes beyond the scope of the pleadings and, therefore, is moot and hypothetical.

96. The referring court's proposed answer is No, a competent authority must take reasonable steps to inform itself of other relevant plans and projects, by analogy with the answer under the second question.

97. The relevance of the question is as set out under the second question. The question is not hypothetical, for the reasons set out under the heading of the fourth question.

Sixth question

98. The sixth question is:

> **If the answer to the first question is Yes, does Article 6(3) of Directive 92/43 read in the light of the obligation to remedy the effects of a breach of Union law deriving from Article 4(3) TEU have the effect that where an appropriate assessment for a particular plan or project was incomplete by reason of failing to correctly consider the question of cumulative or in-combination effects by reference to pending plans or projects, a relevant national court before which a challenge to the development consent is sought may refuse to quash the development consent for the plan or project in question where the court considers that it has been established that there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of any European site arising from cumulative or in-combination effects by reference to pending plans or projects?**

99. The applicants' proposed answer is No. Where a particular category of projects, in this case, projects in respect of which an application has been made but not determined, has not been taken into consideration for the purposes of AA, the Court is not the appropriate body to consider whether the possibility of an adverse effect on the integrity of Natura 2000 sites can be excluded beyond a reasonable scientific doubt. This is a matter for the competent authority under Article 6(3) of the Habitats Directive.

100. The State's proposed answer is that if the first question is answered in the affirmative, where an appropriate assessment for a particular development consent was incomplete by reason of failing to correctly consider the question of cumulative or in-combination effects by reference to pending projects, a relevant national court before which a challenge to the development consent is sought may refuse to quash the development consent in question where the court considers that it has been established that there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of any European site.

101. The first named notice party did not offer a specific wording for the answer.

102. The referring court's proposed answer is Yes. If any error in AA is harmless in the sense of not giving rise, in the opinion of the court reviewing the legality of the AA or the associated

development consent, to reasonable scientific doubt as to whether there is an absence of adverse effects on the integrity of any European site, then it would be pointless formalism to require that the AA or the development consent be quashed.

103. The relevance of the question is that in the event that the AA is held to be defective as a result of the answer to the first question, the referring court will need to determine what the appropriate remedy should be and in particular whether it can refuse to quash the decision in the absence of doubt as to adverse effects on a European site.

Seventh question

104. The seventh question is:

> **If the answer to the sixth question is Yes, does Article 6(3) of Directive 92/43, read in the light of the obligation to remedy the effects of a breach of Union law deriving from Article 4(3) TEU and the right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights, have the effect that the assessment by the relevant national court, in the context of a challenge to a development consent, of whether it has been established that there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the European site in question arising from potential cumulative or in-combination effects by reference to pending plans or projects proceed on the basis solely of matters pleaded by the applicant, including matters which the applicant pleaded but failed to establish at an earlier stage of the proceedings, or of the material before the decision-maker, or matters that satisfy both criteria, as opposed to proceeding on the basis of a consideration of all adverse effects including on the basis of such further evidence as may be put before the court when considering whether to annul the development consent, irrespective of whether reliance on such matters has been pleaded by the applicant and of whether or not the applicant has established a claim relating to alleged cumulative or in-combination effects at an earlier stage of the proceedings?**

105. The applicants' proposed answer is that the question does not, from the applicants' perspective, admit of a binary response, for the reasons set out below, and is also based on premises with which the applicants would, respectfully, not agree, the question might otherwise, in general terms, be answered as follows: Article 6(3) of Directive 92/43 has the effect that the assessment by the relevant national court of whether it has been established that there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the European site in question arising from potential cumulative or in-combination effects by reference to pending projects should proceed on the basis of a consideration of all adverse effects but not on the basis of such further evidence as may be put before the court when considering whether to annul the development consent, irrespective of whether reliance on such matters has been pleaded by the applicant and of whether or not the applicant has established a claim relating to alleged cumulative or in-combination effects at an earlier stage of the proceedings. The objections of the applicants to the question are: (1) The premise of this question "whether or not the applicant has established a claim relating to alleged cumulative or in-combination effects at an earlier stage of the proceedings" is hypothetical and not based on the factual matrix in this case. The applicants have established to the satisfaction of the Court that the respondent had omitted to consider any pending projects on the basis that he considered that he had no legal obligation to do so: pending projects were excluded from consideration *in limine*. The applicants' position is that as they have established that a category of projects ('pending projects') exists that was excluded from consideration by the respondent on the basis that he had no obligation to do so, it is not necessary for the applicants to go any further by providing evidence to establish the effects of those projects when no such evidence was submitted in the context of the application process leading to the grant of a development consent. (2) The question is also premised on an unfounded assumption that a respondent decision maker who is seeking to avoid an order of *certiorari* is entitled to bring further evidence before the Court ("including on the basis of such further evidence as may be put before the court"), even where this evidence was not before the respondent when it was considering the application. It is a well-established general principle of Irish law relating to judicial review that an applicant is not entitled to rely on evidence which was not before the decision maker; this principle should be applied symmetrically and, therefore, must apply equally to the decision maker. From an EU law perspective, the evidential parameters of the decision-making process cannot be re-set after the process has been concluded, if the integrity of the AA process is to be maintained, particularly where the public were entitled to and did participate in the decision making process.

106. The State's proposed answer is that strictly without prejudice to the State's primary position that the first question should be answered in the negative, the respondent submits that if the first question is answered in the affirmative, the assessment by the relevant national court of whether it has been established that there is no reasonable scientific doubt as to the absence of adverse effects

on the integrity of the European site in question arising from potential cumulative or in-combination effects must proceed solely by reference to pending projects which have both been pleaded by the applicant and upon which the applicant has established a claim, and which were in the material before the decision-maker.

107. The first named notice party did not offer a specific wording for the answer.

108. The referring court's proposed answer is No. If the previous questions are answered in such a way that the AA is defective and furthermore that it is appropriate for the referring court to consider whether such a legal defect is such as to give rise, in the opinion of that court, to reasonable scientific doubt as to whether there is an absence of adverse effects on the integrity of any European site, then the consideration of the latter question should be a *de novo* consideration on an *ex nunc* basis in the light of best scientific evidence and should not be constrained by questions as to what matters have been previously pleaded or put in evidence or by findings at earlier stages of the judicial review procedure. The right to a remedy in respect of a defective AA would not be effective unless the competent national court could ensure that any effects of the non-compliance with EU law were remedied. The onus to show that there would be no significant effect on the integrity of a European site would lie on the competent authority.

109. The relevance of the question is in effect as set out under the heading of the sixth question, namely to enable the referring court to determine the appropriate order to be made.

Eighth question

110. The eighth question is:

> **If the answer to the first question is Yes, does Article 6(3) of Directive 92/43 have the effect that the assessment by the relevant national competent authority, in the context of a development consent, of whether there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the European site in question, in particular as arising from potential cumulative or in-combination effects by reference to pending plans or projects, is limited to being conducted on the basis of the material before the competent authority at the time that the appropriate assessment was carried out, as opposed to on the basis of the facts and matters as at the time of the decision as to whether to grant the development consent.**

111. The applicants' proposed answer is that Article 6(3) of Directive 92/43 has the effect that the assessment by the relevant national competent authority of whether there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the European site in question, in particular as arising from potential cumulative or in-combination effects by reference to pending projects, should proceed on the basis of the facts and matters as at the time of the decision as to whether to grant the development consent.

112. The State's proposed answer is that strictly without prejudice to the State's primary position that the first question should be answered in the negative, if the first question is answered in the affirmative, the assessment by the relevant national competent authority of whether there is no reasonable scientific doubt as to the absence of adverse effects on the integrity of the European site in question, in particular as arising from potential cumulative or in-combination effects by reference to pending projects, should proceed solely on the basis of the material before the competent authority at the time that the appropriate assessment was carried out.

113. The first named notice party did not offer a specific wording for the answer.

114. The referring court's proposed answer is that the consideration of projects by reference to which in-combination and cumulative assessment should be made should take into account any relevant matter (including the existence or details of any plan or project) of which the competent authority becomes aware prior to the decision to grant the development consent. If a new plan or project of significance comes to the competent authority's attention after an AA, the competent authority should ensure that the conclusions of the AA remain correct in the light of that other project. Such an obligation is not unworkable at the level of principle as it does not extend beyond projects that come to the attention of the competent authority.

115. The relevance of the question is in effect as set out under the heading of the second and sixth questions, namely to enable the referring court to determine the appropriate order to be made and provide for appropriate directions on remittal to the competent authority.

Order

116. For the foregoing reasons, it is ordered that:

(i) the questions set out in this judgment, in relation to which the expedited procedure under Article 105 of the Rules of Procedure of the CJEU is being requested, be referred to the CJEU pursuant to Article 267 TFEU;

(ii) the CJEU be requested to note that the first named applicant has requested the referring court to inform the CJEU that he does not wish his name to be anonymised for the purposes of the proceedings in the CJEU and therefore that he can be named

by the CJEU including by way of the publication of materials or of the judgment of that court;

(iii) the substantive determination of the remaining elements of the proceedings be adjourned pending the judgment of the CJEU, without prejudice to the determination of any appropriate procedural or interlocutory issues in the meantime;

(iv) the parties be required to comply with the directions regarding preparation of papers for transmission to the CJEU as set out in Guidance Notes attached to Practice Direction HC124, so that all papers are received by the List Registrar by 13:00 on Friday 12th January, 2024, at the latest;

(v) the parties be required to comply with the directions to keep the referring court informed of progress of the reference as set out in para. 100(vii) of *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 610, [2021] 10 JIC 0406;

(vi) the CSSO be requested to draw the attention of the Attorney General's Office and the Law Reform Commission to the errors on the statute book website and the commission's website as set out in the judgment;

(vii) the matter be listed for mention on 15th January, 2024 to confirm progress in relation to the foregoing and for directions as to the sequence and timing of hearing any current interlocutory or procedural issues in relation to the proceedings including any issue on costs other than in relation to the reference; and

(viii) the costs relating to the reference be reserved with liberty to apply, and the costs other than relating to the reference and not already disposed of be adjourned to a date to be fixed.