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Your Ref: TR030001

Our Ref: JD.AMEP.A.L12/0047

Date: 23rd November 2012

For the attention of Robert Upton

Dear Sirs

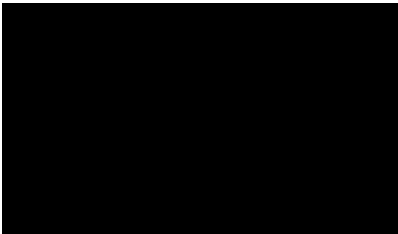
**APPLICATION FOR DEVELOPMENT CONSENT
BY ABLE HUMBER PORTS LTD FOR THE PROPOSED ABLE MARINE ENERGY PARK**

**The Infrastructure Planning (Examination Procedure) Rules 2010 – Rule 17
Further Information**

Thank you for your letter dated 15th November 2012 requesting views on how the protection of the 'overall coherence of Natura 2000' [Article 6(4) of the Habitats Directive 92/43/EEC] should be interpreted and applied in the present case.

Please find our response attached.

Yours sincerely



RICHARD CRAM
Design Manager

Enc






ABLE MARINE ENERGY PARK

**THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE)
RULES 2012
RULE 17 FURTHER INFORMATION
15TH NOVEMBER 2012**

APPLICANT'S RESPONSE

	ABLE MARINE ENERGY PARK THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2012 RULE 17 FURTHER INFORMATION 15TH NOVEMBER 2012 APPLICANT'S RESPONSE	Date: 23-Nov-2012
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Would the parties please give their views on how the protection of the 'overall coherence of Natura 2000' [Article 6(4) of the Habitats Directive 92/43/EEC] should be interpreted and applied in the present case?

Response

1. Where the Secretary of State determines that a plan or project must proceed for imperative reasons of overriding public interest, in spite of a negative assessment of the implications for the site, and in the absence of alternative solutions, he is under a duty to take all compensatory measures "to ensure that the overall coherence of Natura 2000 is protected", pursuant to Article 6(4) of the Habitats Directive.
2. It is important to note that the Habits Directive envisages that consent may be granted where an adverse effect upon the integrity is permanent (see the recent opinion of the Advocate General in *Sweetman* – attached hereto) provided that the requirements in article 6(4) are met e.g. in terms of alternatives and IROPI.
3. Thus the duty for compensation to protect the 'overall coherence of Natura 2000' network of sites. It is a quite different test to the test of whether the compensation will ensure that there is no adverse affect upon the integrity of the protected site in question. This is important because the submission of the RSPB and ABP on this point are based upon a fundamental misunderstanding of this distinction.


Managing Natura 2000

4. European Commission guidance, *Managing Natura 2000*, deals with the expression "overall coherence of the Natura 2000 network", explains at paragraph 5.4.3:-

"The expression 'overall coherence' appears in Article 6(4) in the context where a plan or project is allowed to be carried out for imperative reasons of overriding public interest and the Member State has to take measures to compensate for the loss.

It also appears in Article 3(1) which states that Natura 2000 is 'a coherent European ecological network of special areas of conservation' and in Article 3(3) which stipulates that 'where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10.'

Article 10, which deals more generally with land-use planning and development policy, stipulates that 'Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the features of the landscape which are of major importance for wildfauna and flora.

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Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species.'

The word 'ecological' is used both in Article 3 and Article 10 to explain the character of the coherence. It is obvious that the expression 'overall coherence' in Article 6(4) is used in the same meaning."

5. The term 'overall coherence of Natura 2000' clearly refers to the overall ecological coherence of the network.

6. The Commission guidance goes on:-

"Article 6(4) requires to 'protect' the overall coherence of Natura 2000. Thus, the directive presumes that the 'original' network has been coherent. If the derogation regime is used, the situation must be corrected so that the coherence is fully restored.

Under the 'Habitats' directive the selection of a site for the Natura 2000 network rests on:-

- *the taking into account of habitat and species in proportions (surfaces, populations) described in the standard data form;*
- *the inclusion of the site in a biogeographical region within which it is selected;*
- *the selection criteria established by the 'Habitats' Committee and used by the European Topic Centre*
- *Nature Conservation to advise the Commission to retain a site on the Community list."*

7. The summary provided in *Managing Natura 2000* is as follows:-

"In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: (a) address, in comparable proportions, the habitats and species negatively affected; (b) concern the same biogeographical region in the same Member State; and (c) provide functions comparable to those which had justified the selection criteria of the original site. The distance between the original site and the place of the compensatory measures is not therefore an obstacle, as long as it does not affect the functionality of the site and the reasons for its initial selection."

8. The compensation package proposed by the Applicant ensures the overall coherence of Natura 2000: it addresses, in comparable proportions, the habitats and species negatively affected through the provision of replacement mudflat habitat and wet grassland along with a replacement roost site for Black tailed godwit. It concerns the same biogeographical region – the Humber Estuary – in the same Member State, and it provides functions comparable to those which justified the selection of the original site.

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European Commission guidance on Article 6(4), 2012

9. The European Commission has also produced guidance specifically on Article 6(4) of the Habitats Directive. This guidance repeats the paragraphs quoted above from *Managing Natura 2000*, and provides the following additional guidance at paragraph 1.4.3, under the heading '*Objective and general contents of compensatory measures*':-

"The compensatory measures sensu stricto have to ensure the maintenance of the contribution of a site to the conservation at a favourable status of natural habitat types and habitats of species 'within the biogeographical region concerned'. In short, ensure the maintenance of the overall coherence of the Natura 2000 Network.

It results from this:

- *that, as a general principle, a site should not be irreversibly affected by a project before the compensation is indeed in place. However, there may be situations where it will not be possible to fill this condition [sic]. For example, the recreation of a forest habitat would take many years to ensure the same functions as an original one negatively affected by a project. Therefore, best efforts should be made to assure compensation is in place beforehand and in the case this is not fully achievable, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime.*
 - *that the compensation must be additional in relation to the Natura 2000 network to which the Member State should have contributed in conformity with the Directives."*
10. This guidance states that generally a site should not be irreversibly affected before compensation is in place, but recognises that this will not always be possible.
11. Paragraph 1.5.2 of the guidance explains that:-
- "Compensatory measures must be feasible and operational in reinstating the ecological conditions needed to ensure the overall coherence of the Natura 2000 network (i.e. the ecological structure and functions impaired and the habitats and species involved)."*
12. Paragraph 1.5.1 explains:-
- "Once the biological integrity likely to be damaged and the actual extent of the damage have been identified, the measures in the compensation programme must address specifically those effects, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are preserved in the long term. Thus, these measures should be the most appropriate to the type of impact predicted and should be focused on objectives and targets clearly addressing the Natura 2000 elements affected. This requires that measures clearly refer to the structural and functional aspects of the site integrity, and the related types of habitat and species populations that are affected."*

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13. The stated aim in this guidance is that the elements of biological integrity which contribute to the overall coherence of the Natura 2000 network are preserved "in the long term".

14. Paragraph 1.5.6 the guidance explains that:-

"Timing the compensatory measure demands a case-by-case approach, where the schedule adopted must ensure the continuity of the ecological processes essential for maintaining the biological structure and functions that contribute to the overall coherence of the Natura 2000 network. This requires a tight coordination between the implementation of the plan or project and the implementation of the measures, and relies on issues such as the time required for habitats to develop and/or for species populations to recover or establish in a given area."

15. It is clear from the guidance that the principle aim of the compensatory measures is to ensure the continuity of the ecological processes essential for maintaining the biological structure and functions that contribute to the overall coherence of the Natura 2000 network.

16. Paragraph 1.5.6 goes on:-

"In addition, other factors and processes must also be considered:-


- *A site must not be irreversibly affected before compensation is in place.*
- *The result of compensation should be effective at the time the damage occurs on the site concerned. Under certain circumstances where this cannot be fully achieved, overcompensation would be required for the interim losses.*
- *Time lags might only be admissible when it is ascertained that they would not compromise the objectives of 'no net losses' to the overall coherence of the Natura 2000 network."*

17. The guidance distinguishes between a site being 'irreversibly affected' and a site being 'damaged': while it should not (paragraph 1.4.3) or must not (paragraph 1.5.6) be irreversibly affected before compensation is in place, there are circumstances in which it can be damaged before compensation is effective, or functional. The third bullet point in paragraph 1.5.6 explains that time lags may be permissible where they would not compromise the objectives of 'no net losses' to the overall coherence of Natura 2000. This supports the view that while there must be no irreversible impact to the coherence of the network as a whole before compensation is in place, there may be circumstances in which damage to a site will not irreversibly affect the coherence of the Natura 2000 network.

DEFRA Guidance

18. In August 2012 DEFRA produced, for consultation, guidance on the application of Article 6(4). Paragraph 20 of the guidance explains that:-

"The Habitats Directive seeks to create a coherent ecological network of protected sites, therefore if harm to one site is allowed – because there are no alternatives and IROPI can be shown – it must be compensated for so the coherence of the network as a whole is maintained."

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19. Paragraph 24 of the guidance explain that:-

"Compensation must be secured before damage occurs. This includes ensuring all legal, technical and financial arrangements are in place. Compensation measures should normally be delivered before the adverse effect on the European site occurs, as this reduces the chance of harming the network of sites and also ensures there is no loss during the period before the compensatory measures are implemented."

20. This paragraph draws a distinction between compensation measures being secured and delivered. In order to ensure the coherence of Natura 2000 compensation measures must be *secured* before damage to a site occurs. A developer cannot damage a protected site unless all the legal, technical and financial arrangements are in place, which ensure that the compensation can be provided. He cannot, effectively, damage a site and simply say 'We will think about how to compensate for this later'. The compensation package must be secured before damage occurs.

21. However, the statement in the DEFRA guidance that "*Compensation measures should normally be delivered before the adverse effect on the European site occurs, as this reduces the chance of harming the network of sites*" recognises that the adverse effect on a European site is not the same as harm to the network of sites, which is what the Secretary of State must ensure is protected. An adverse effect on a particular site will not necessarily harm the network of sites, because it can be addressed through compensation.


22. Natural England appears to endorse this position in its summary of the compensation hearings (paragraph 37), stating:-

"Failure to provide compensation measures at the time of loss increases the risk of harm to the coherence of Natura 2000", (underline added).

23. While it considers that failure to provide compensation at the time of the loss *increases* the risk of harm to the coherence of Natura 2000, quite correctly it does not suggest that a failure to provide compensation at the time of loss inevitably, and in itself *harms* the Natura 2000 network.

24. The Applicant has accepted that harm will occur to the integrity of North Killingholme foreshore site. That is why it has to satisfy the Secretary of State that the requirements of Article 6(4) are met. However, in light of its compensation proposals, the *overall* coherence of the Natura 2000 network will be protected in spite of the harm to that particular site. Indeed it is anticipated that the resultant compensatory package will in fact improve the overall coherence of the Natura 2000.


25. The duty which Article 6(4) places on the Secretary of State is to ensure that there is no irreversible damage to the Natura 2000 network: thereby ensuring that its coherence is protected. Natura 2000 would be irreversibly damaged if its overall coherence could not be protected once the compensation was in place and fully functional. If a particular site was damaged and its ecological functions could never be replaced either on site or elsewhere, the effect of this would be that the overall coherence of Natura 2000 would very likely not be protected as required by article 6(4).

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Similarly, if, as a result of damage to a particular site, material population losses occur from which the population cannot recover within the Natura 2000 as a whole, this would irreversibly harm the coherence of Natura 2000 and mean that it was not protected.

26. However, interim or even permanent damage to one particular site will not necessarily damage the coherence of the Natura 2000 network (as distinct from adversely affecting the integrity of the particular site), provided the ecological functions of that site are replaced so that there is no irreversible harm to the network as a whole. This explains why the guidance documents accept that interim losses and time lags may be permissible in certain circumstances. If the Secretary of State's duty involved ensuring that no individual site was irreversibly damaged before compensation was fully functional, no time lag or interim losses would ever be permissible.
27. This position is supported by the DEFRA guidance, which explains (paragraph 25) that:-

*"In certain situations damage to European sites may necessarily occur before the compensatory measures are fully functioning. **There may also be circumstances where the compensatory measures will take a long time to become fully-functioning (e.g. re-creation of woodland). In such circumstances it may be acceptable to put in place measures which do not provide a complete functioning habitat before losses occur, provided undertakings have been made that the measures will in time provide such a habitat and additional compensation is provided to account for this.** Such cases require careful consideration by the competent authority in liaison with statutory nature conservation bodies."*
28. Taking that example, if the ecological function provided by the woodland could never be replaced, that would cause irreversible damage to the overall coherence of the Natura 2000 network. However, if the ecological function can be replaced, even if it will take a long time to do so, the overall coherence of Natura 2000 will not necessarily be damaged.
29. The Applicant reiterates the case put at the hearings of 12th and 13th November 2012 (and included at paragraph 127 of the written summary of those hearings): simultaneity is plainly not always achievable or necessary to ensure that the overall coherence of the Natura 2000 network is protected. References to 'recovery' of species recognise that there may be interim losses. The guidance documents recognise that there will be circumstances in which the coherence of Natura 2000 will not be impaired by there being a time lapse between the loss of habitat and its replacement.
30. In the present case, the compensation package will mean there is no irreversible harm to the overall coherence of the Natura 2000 network. A substantial amount of engineering expertise has been focused on developing sustainable compensatory habitat: far more technical effort that would normally be expected at this stage of a project, so providing greater technical certainty as to the outcome.

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31. Furthermore, the compensation provided at the outset overcompensates by providing an alternative wet roost and a substantial area of wet grassland: this habitat is over and above the 'like for like' compensation of mudflat which is provided at a multiple of 2:1 for compensation:loss. Additional further over compensation is provided on the south side of the Humber as well.
32. Any interim population losses in the Humber Estuary SPA caused in the short-term by the loss of North Killingholme foreshore will be reversible, and will not therefore, harm the overall coherence of the Natura 2000 network.
33. The world population of Icelandic black-tailed godwits continues to increase after a brief period of stability from 2005/06-2008/09 (Holt et al, 2012. *Water birds in the UK 2010/11: The Wetland Bird Survey*). The flyway population estimate was revised upwards by 30% in 2012, with these trends being attributed partly to improved breeding success. The bird has a typical lifespan of 18 years (the longevity record is over 23 years). The possibility that the SPA cannot absorb displaced birds in the interim appears, in broad overview, remote. But if the SPA does not have such spare capacity, any possible short-term impact is fully expected to be reversible.

Conclusion

34. The overall target duty is to ensure that the coherence of the Natura 2000 network is be maintained following the functioning of the compensation package. This means that the impact upon the coherence of the network should not be irreversible. This does not mean that there should not be an irreversible impact at the particular project site in question – otherwise no time lag could ever be allowed.
35. The compensation package proposed in this case ensures that the Secretary of State will be able to comply with his duty to ensure that the overall coherence of the Natura 2000 network is protected: there will be no loss or harm to the overall coherence of the network, in light of the compensation proposals put forward by the Applicant. Furthermore, it is likely that the compensation package will in fact provide an enhancement to the overall coherence of the Natura 2000. This latter point is not merely additional comfort in the success of the compensation but is of itself an additional factor in favour of granting consent for the development proposal.

	<p style="text-align: center;">ABLE MARINE ENERGY PARK THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2012 RULE 17 FURTHER INFORMATION 15TH NOVEMBER 2012 APPLICANT'S RESPONSE</p>	<p style="text-align: right;">Date: 23-Nov-2012</p>
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ATTACHMENT

Opinion of Advocate General Sharpston
Peter Sweetman v An Bord Pleanala

СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA
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DEN EUROPÆISKE UNIONS DOMSTOL
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EUROOPA LIIDU KOHUS
ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
COURT OF JUSTICE OF THE EUROPEAN UNION
COUR DE JUSTICE DE L'UNION EUROPÉENNE
CÚIRT BHREITHIÚNAIS AN AONTAIS EORPAIGH
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS TIESA



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TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ
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CURTEA DE JUSTIȚIE A UNIUNII EUROPENE
SÚDNY DVOR EURÓPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 22 November 2012 ¹

Case C-258/11

Peter Sweetman
Ireland
Attorney General
Minister for the Environment, Heritage and Local Government
v
An Bord Pleanála

(Reference for a preliminary ruling from the Supreme Court (Ireland))

(Environment – Special conservation areas – Assessment of the impact of a plan or project on a protected site – Adverse effect on the integrity of the site)

¹ – Original language: English.

Introduction

1. This reference for a preliminary ruling concerns the interpretation of Article 6 of the Habitats Directive.² The particular issue before the Court involves the proper interpretation of paragraph 3 of that article, which relates to plans or projects not directly connected with or necessary to the management of a habitat site. That provision applies where such a plan or project is ‘likely to have a significant effect’ on the site. If so, there must be an appropriate assessment of the implications for the site. It is only where, following that assessment, the competent national authorities have ascertained that the plan or project will not ‘adversely affect the integrity of the site’ that they may agree to it. The national court seeks guidance on the meaning of the last of these phrases.

Legal framework

European Union (‘EU’) legislation

2. Article 1 of the Directive contains the following definitions:

‘(a) “conservation” means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

...

(d) “priority natural habitat types” means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

(e) “conservation status of a natural habitat” means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as “favourable” when:

- its natural range and areas it covers within that range are stable or increasing, and

² – Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, with corrigendum OJ 1993 L 176, p. 29) (‘the Directive’).

- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable as defined in (i);

...

(i) “conservation status” of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The conservation status will be taken as “favourable” when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

(j) “site” means a geographically defined area whose extent is clearly delineated;

(k) “site of Community importance” means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

...

(l) “special area of conservation” means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated.’

3. Article 2 provides:

‘(1) The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

(2) Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

(3) Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

4. Article 3(1) states:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

...'

5. Article 4 lays down the procedure for the designation of habitat sites under the Directive. Essentially, this involves the preparation of a list of appropriate sites by each Member State, which is then transmitted to the Commission (Article 4(1)). On the basis of the information provided, the Commission is then, in agreement with each Member State, to prepare a draft list of sites of Community importance ('SCIs'), the purpose of which is to identify those hosting one or more priority natural habitat types or priority species. The list of selected sites is then to be adopted formally by the Commission (Article 4(2)). Once a site has been adopted as an SCI in accordance with the procedure laid down in paragraph 2, the Member State is to designate it as a special area of conservation ('SAC') within a period not exceeding six years (Article 4(4)). However, as soon as a site is placed on the list of sites adopted by the Commission as SCIs, it is to be subject to the obligations laid down in Article 6(2), (3) and (4) (Article 4(5)).

6. Article 6 provides:

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

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.’

7. Annex 1 to the Directive includes the following entry:

– ‘8240 * Limestone pavements’.

National law

8. Road developments in Ireland are subject to the provisions of the Roads Act 1993 (as amended). Sections 50 and 51 of that Act, together with the European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999, prescribe a development procedure for those projects. That procedure requires the carrying out of an environmental impact assessment for the purposes of Directive 85/337.³

9. In addition, if a road development is likely to have a significant effect on certain sites of ecological importance, it will be subject to the European Communities (Natural Habitats) Regulations 1997 (as amended) (‘the Regulations’), which transpose the Directive into national law.

10. Regulation 2 of the Regulations defines a ‘European site’ so as to include sites which Ireland proposes to submit to the Commission for adoption as an SCI.

³ – Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

Regulation 4 lays down a procedure for notifying sites within Ireland. Such sites are subsequently included in the list transmitted to the European Commission pursuant to Article 4(1) of the Directive.

11. Regulation 30 of the Regulations ('Regulation 30') provides:

'1. Where a proposed road development in respect of which an application for the approval of the Minister for the Environment has been made in accordance with section 51 of the Roads Act, 1993, is neither directly connected with nor necessary to the management of a European site but likely to have a significant effect thereon either individually or in combination with other developments, the Minister for the Environment shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

...

3. The Minister for the Environment shall, having regard to the conclusions of the assessment undertaken under paragraph (1), agree to the proposed road development only after having ascertained that it will not adversely affect the integrity of the European site concerned.

...

5. The Minister for the Environment may, notwithstanding a negative assessment and where that Minister is satisfied that there are no alternative solutions, decide to agree to the proposed road development where the proposed road development has to be carried out for imperative reasons of overriding public interest.

6.(a) Subject to paragraph (b) imperative reasons of overriding public interest shall include reasons of a social or economic nature;

(b) If the site concerned hosts a priority natural habitat type or a priority species, the only considerations of overriding public interest shall be:

- (i) those relating to human health or public safety,
- (ii) beneficial consequences of primary importance for the environment, or
- (iii) further to an opinion from the Commission to other imperative reasons of overriding public interest.'

12. According to the national court, the effect of the domestic provisions is that protection equivalent to that laid down under Article 6(2), (3) and (4) of the Directive will apply to a site from the date on which affected owners and occupiers are notified of a proposal to include that site in a list to be transmitted to the Commission. Such protection will thus apply prior to its inclusion on the list adopted by the Commission as an SCI pursuant to Article 4 of the Directive.

Facts, procedure and questions referred

13. By Decision 2004/813,⁴ the Commission adopted a draft list of SCIs pursuant to Article 4(2) of the Directive. That list included a site comprising Lough Corrib and surrounding areas, situated in County Galway, Ireland. The total area of the site extended to some 20 582 hectares.

14. By Decision 2008/23,⁵ the Commission repealed Decision 2004/813 and adopted a first updated list of SCIs. That list included the Lough Corrib site, with its area being unchanged.

15. In December 2006, the competent minister notified, within Ireland, an extended Lough Corrib site, comprising some 25 253 hectares. The extension amounted to roughly 4 760 hectares. The extended site includes 270 hectares of limestone pavement, which is a priority natural habitat type listed in Annex I to the Directive.

16. In December 2007, the extended site was included in a list of sites transmitted by Ireland to the Commission pursuant to Article 4(1) of the Directive.

17. By Decision 2009/96,⁶ the Commission repealed Decision 2008/23 and adopted a second updated list of SCIs. That list included the extended Lough Corrib site.

18. In the meantime, An Bord Pleanála (the Irish Planning Board) ('the Board'), which is the competent national authority in Ireland for the purposes of Article 6 of the Directive, had adopted a decision ('the decision at issue') on 20 November 2008 to grant development consent to build a proposed road through part of the Lough Corrib site. The proposed road is known as the 'N6 Galway City Outer Bypass road scheme'. The part of the site through which the road is intended to pass falls within the extended area of 4 760 hectares referred to in point 15 above.

19. If the road development proceeds, 1.47 hectares of limestone pavement will be permanently lost.⁷ That loss would occur within the extension of the site, which

⁴ – Commission Decision 2004/813/EC of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region (OJ 2004 L 387, p. 1).

⁵ – Commission Decision 2008/23/EC of 12 November 2007 adopting, pursuant to Council Directive 92/43/EEC, a first updated list of sites of Community importance for the Atlantic biogeographical region (OJ 2008 L 12, p. 1).

⁶ – Commission Decision 2009/96/EC of 12 December 2008 adopting, pursuant to Council Directive 92/43/EEC, a second updated list of sites of Community importance for the Atlantic biogeographical region (OJ 2009 L 43, p. 466).

⁷ – The Commission asserts that this figure is inaccurate and underestimates the area of limestone pavement that would be sacrificed. That point is not, however, raised either explicitly or by

contains 85 of the 270 hectares of limestone pavement located within the entire Lough Corrib site.

20. Prior to the adoption of the decision at issue, the Board appointed an expert inspector to carry out an assessment of the environmental implications of (inter alia) the road development for the site. As part of his duties, he inspected the site over a period of nine months and held a hearing, which took place over a total of 21 days and at which interested parties were represented orally and/or in writing. On the basis of the inspection and the information and arguments presented at the hearing, the inspector produced a report and recommendations which he submitted to the Board. In that report, he took the view that the loss 'in the region of 1.5 hectares' of limestone pavement had to be considered in relation to the 85 hectares of pavement contained within the extension to the original Lough Corrib site – viewing that extension as a 'distinct sub-area' of the whole site – and not in the context of the 270 hectares of pavement contained within the site taken as a whole. He also noted that the area of limestone pavement that would fall to be removed as a result of the road scheme had been reduced by what he considered 'a significant amount' (from 3.8 hectares to 1.5 hectares) as a result of measures taken to mitigate the loss of pavement. As regards the loss itself, the inspector concluded that 'this relatively small loss would not, in terms of quantity, amount to an adverse effect on the integrity of the area'. In relation to issues of fragmentation and disturbance, he found that 'the proposed development would not seriously affect the achievement of the site's conservation objectives and would not seriously affect the integrity of the site'.

21. The inspector also concluded that 'the assessment of a severe negative magnitude of impact, allowing for appropriate mitigating measures' was not unreasonable. It is clear from the order for reference that in using the expression 'severe negative magnitude of impact' in his report, the inspector was following guidelines laid down by the Irish National Roads Authority. The effect of those guidelines was to require that any permanent impact upon a site such as the Lough Corrib site be deemed 'severe negative'. The use of the expression should thus be seen as referring to the permanence of the impact.

22. In the decision at issue, the Board agreed with the inspector's assessment of the environmental impact of the project. The Board concluded that the development 'while having a localised severe impact on the Lough Corrib [site] would not adversely affect the integrity of the [site]. The development ... would not, therefore, have unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area'.

implication in the order for reference. To the extent that the point concerns a question of fact, the Court is unable to address it. To the extent that the Commission's arguments on the point raise questions of interpretation – and hence of law – those questions do not fall within the framework of the questions posed by the referring court, nor do they require to be answered in order to address those questions. I therefore do not consider them further.

23. Mr Sweetman challenged the decision at issue before the High Court (Ireland), arguing in particular that the Board had been wrong to conclude that the road project would not adversely affect the integrity of the Lough Corrib site. Having lost that application at first instance, Mr Sweetman has lodged an appeal before the Supreme Court, which has referred the following questions for a preliminary ruling:

- ‘(1) What are the criteria in law to be applied by a competent authority to an assessment of the likelihood of a plan or project the subject of Article 6(3) of [the Directive], having “an adverse effect on the integrity of the site”?’
- (2) Does the application of the precautionary principle have as its consequence that such a plan or project cannot be authorised if it would result in the permanent non-renewable loss of the whole or any part of the habitat in question?
- (3) What is the relationship, if any, between Article 6(4) and the making of the decision under Article 6(3) that the plan or project will not adversely affect the integrity of the site?’

24. Written observations have been submitted by Mr Sweetman, the Board, Galway County Council and Galway City Council (together ‘the Local Authorities’), Ireland, the United Kingdom Government and the European Commission. At the hearing on 12 September 2012, Mr Sweetman, the Board, the Local Authorities, Ireland, the Greek and United Kingdom Governments and the Commission were represented and made oral submissions to the Court.

Analysis

Admissibility

25. At the time of the decision at issue, the extension to the Lough Corrib site had been notified within Ireland pursuant to Regulation 4 of the Regulations but had not yet been included on the list of sites adopted by the Commission as an SCI. It was thus subject to protection laid down in Regulation 30 but not to that of Article 6(2), (3) and (4) of the Directive.⁸ The Supreme Court was, I feel sure, fully aware of this point when it made the reference. The Local Authorities argue, however, that the questions referred therefore relate exclusively to the interpretation of national law and fall outwith the jurisdiction of the Court. The Court should accordingly decline to answer them.

⁸ – The decision at issue was dated 20 November 2008. The Commission’s decision to include the extended site on the updated list of SCIs was adopted on 12 December 2008, that is to say, some three weeks after the date of the decision at issue.

26. In my view, such a narrow interpretation of Article 267 TFEU is not justified.

27. It is clear from the Court's case-law that it has jurisdiction to give preliminary rulings in cases that concern national legislation enacted with a view to implementing EU law, even though the situation in the main proceedings is not, as such, governed by that law.

28. That will be the case where the national provisions at issue seek to adopt the same solutions as those adopted in EU law, provided the provisions in question are made applicable under national law in a direct and unconditional way. The legislation must contain sufficiently precise indications from which it can be deduced that the national legislature intended to refer to the content of the EU provisions. The Court has justified that interpretation of Article 267 TFEU on the ground that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.⁹

29. That does not mean to say that the Court will accept jurisdiction to give a ruling in every case involving the application of national provisions based on EU law. Thus, in *Kleinwort Benson*,¹⁰ it held that a reference was inadmissible on the ground that the domestic legislation at issue failed to contain 'a direct and unconditional *renvoi*' to the provisions of European law so as to incorporate them into the domestic legal order, but instead took those provisions as a model only. While, moreover, certain provisions of the domestic legislation were taken almost word for word from their European equivalent, others departed from it and express provision was made for the authorities of the Member State concerned to adopt modifications 'designed to produce divergence' from that equivalent.

30. While the scope of Regulation 30 is limited to proposals for road development, and is thus narrower than that of Article 6(3) and (4) of the Directive, it is none the less clear that it seeks to adopt the same solutions in that context as those envisaged by those provisions. Its application is both direct and unconditional. The title of the Regulations makes it apparent that they were enacted for the purpose of transposing European legislation into national law.¹¹

31. Against that background, I am of the view that the need to forestall future differences of interpretation as between Regulation 30 of the Regulations and Article 6(3) of the Directive is paramount. Once a site has been included on the list

⁹ – See generally, in that regard, Case C-482/10 *Cicala* [2011] ECR I-0000, paragraphs 17 to 19.

¹⁰ – Case C-346/93 [1995] ECR I-615, paragraph 16.

¹¹ – See, in that regard, Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10627, paragraph 22.

of sites adopted by the Commission as SCIs, it is plain that Regulation 30, in its application to that site, will fall to be interpreted in accordance with Article 6(3). Equally, Regulation 30 must be interpreted and applied consistently under national law, whether or not the site in question has (yet) been so adopted. Consequently, the Irish courts must be sure, when interpreting Regulation 30 in a case where Article 6(3) does not (yet) apply, that they will not have to change that interpretation subsequently in a case where it does apply.¹²

32. The Local Authorities argue that the necessary European dimension is missing: as the site was not, at the relevant time, within the scope of Article 6(3), the Commission would not be competent to give an opinion for the purposes of Article 6(4). That point seems to me to be irrelevant. It does not detract in any way from the need to forestall the differences of interpretation referred to in point 31 above. Furthermore, if (on a correct interpretation of Regulation 30, read in the light of the Directive) the only way the development could proceed is by way of Article 6(4) of the Directive, it seems to me that Ireland would be obliged either to withdraw the site from the list of sites referred to in point 16 above (quite how it would do so is not clear) or wait until the site was designated and then approach the Commission under Article 6(4). But that is merely the logical consequence of aligning national law with the Directive's requirements in advance of the actual point at which Natura 2000 was established.

33. In the light of all of the above, it seems to me that the Supreme Court was entirely right to make a reference to this Court and it is appropriate that this Court should give a ruling.

Question 1

34. By this question, the national court seeks guidance on the interpretation of Article 6(3) and, in particular, the phrase 'adverse effect on the integrity of the site'.

35. As the Board pointed out at the hearing, this case is unusual in so far as much of the Court's previous case-law concerns situations where there has been no appropriate assessment in terms of that provision and the question is whether such an assessment is necessary.¹³ Here, by contrast, an assessment was undertaken and there is no suggestion that it was improperly conducted – indeed, all the indications are that it was done with great care.¹⁴ Rather, the issue concerns the conclusion

¹² – As, indeed, it now does to the extended Lough Corrib site.

¹³ – See, for example, Case C-179/06 *Commission v Italy* [2007] ECR I-8131; Case C-241/08 *Commission v France* [2010] ECR I-1697; Case C-226/08 *Stadt Papenburg* [2010] ECR I-131; and Case C-182/10 *Solvay and Others* [2012] ECR I-0000.

¹⁴ – See points 20 to 22 above.

reached as a result of that assessment, on the basis of which the Board adopted the decision at issue.

36. While the question covers a single expression used in Article 6(3), that expression must be understood having regard to the context in which it is used. I shall therefore consider the objectives which the Directive sets out to achieve, before turning to the obligations laid down in Article 6 as a whole.

The objectives of the Directive

37. Article 2(1) states that the aim of the Directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild flora and fauna throughout the Member States. Article 2(2) goes on to provide that measures taken pursuant to the Directive must be designed to *maintain at or restore to*, a favourable conservation status, natural habitats and species of wild flora and fauna ‘of Community interest’.

38. The term ‘conservation’ is defined in Article 1(a) as ‘a series of measures required to maintain or restore ... natural habitats ... at a favourable status’. By Article 1(e), the conservation status of a natural habitat is to be taken as ‘favourable’ when, inter alia, the natural range and areas it covers within that range are *stable or increasing* and the specific structure and functions which are necessary for its long-term maintenance *exist and are likely to continue to exist* for the foreseeable future.

39. To that end, Article 3(1) requires the setting-up, under the ‘Natura 2000’ title, of a coherent European ecological network of special areas of conservation. That network is intended to enable, inter alia, the natural habitat types listed in Annex I to be maintained at or, where appropriate, restored to a favourable conservation status in their natural range.

40. It is thus an essential objective of the Directive that natural habitats be maintained at and, where appropriate, restored to a favourable conservation status. Such an aim is necessary in the context – recorded in the fourth recital in the preamble to the Directive – of a continuing deterioration in those habitats and the need to take measures in order to conserve them. That is *a fortiori* the case as regards priority natural habitat types. Article 1(d) defines these as ‘natural habitat types in danger of disappearance’, stating that the Community has ‘particular responsibility’ for their conservation.

Article 6

41. Article 6 falls to be construed against that background. As regards natural habitats, it provides for necessary conservation measures to be established in relation to SACs (Article 6(1)) and for steps to be taken to avoid the deterioration of those habitats (Article 6(2)), on the one hand, and sets out a series of procedures

to be followed in the case of plans or projects that are not directly connected with or necessary to the management of the site (Article 6(3) and (4)), on the other. Without those provisions, the notions of maintenance and restoration on which the Directive is based would risk being of no practical effect.

42. Of the measures prescribed by Article 6, those laid down by the first paragraph, which relate to the establishment of conservation measures, are not directly relevant to the question. They exist, essentially, in order to ensure that positive steps are taken, on a more or less regular basis, in order to ensure that the conservation status of the site in question is maintained and/or restored.

43. Paragraphs 2, 3 and 4 of Article 6 serve a different purpose. Paragraph 2 imposes an overarching obligation to avoid deterioration or disturbance. Paragraphs 3 and 4 then set out the procedures to be followed in respect of a plan or project which is not directly connected with or necessary to the management of the site (and which is thus not covered by paragraph 1) but which is likely to have a significant effect thereon. Collectively, therefore, these three paragraphs seek to pre-empt damage being done to the site or (in exceptional cases where damage has, for imperative reasons, to be tolerated) to minimise that damage. They should therefore be construed as a whole.

44. Article 6(2) imposes a general requirement on the Member States to maintain the status quo.¹⁵ The Court has described it as ‘a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive’s objectives’.¹⁶ The obligation Article 6(2) lays down is not an absolute one, in the sense that it imposes a duty to ensure that no alterations of any kind are made, at any time, to the site in question. Rather, it is to be measured having regard to the conservation objectives of the site,¹⁷ since that is why the site is designated. The requirement is thus to take all appropriate steps to avoid those objectives being prejudiced. The authenticity of the site as a natural habitat, with all that that implies for the biodiversity of the environment, is thus preserved. Benign neglect is not an option.

¹⁵ – See inter alia, in that regard, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 32; Case C-535/07 *Commission v Austria* [2010] ECR I-9483, paragraph 58; and Case C-404/09 *Commission v Spain* [2011] ECR I-0000, paragraph 127.

¹⁶ – See *Stadt Papenburg*, cited in footnote 13 above, paragraph 49 and the case-law cited.

¹⁷ – See, in that regard, *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above, paragraph 46.

45. Article 6(3), by contrast, is not concerned with the day-to-day operation of the site. It applies only where there is a plan or project not directly connected with or necessary to site management. It lays down a two-stage test. At the first stage, it is necessary to determine whether the plan or project in question is ‘likely to have a significant effect [on the site]’.

46. I would pause here to note that, although the words ‘likely to have [an] effect’ used in the English-language version of the text¹⁸ may immediately bring to mind the need to establish a degree of probability – that is to say that they may appear to require an immediate, and quite possibly detailed, determination of the impact that the plan or project in question might have on the site – the expression used in other language versions is weaker. Thus, for example, in the French version, the expression is ‘*susceptible d’affecter*’, the German version uses the phrase ‘*beeinträchtigen könnte*’, the Dutch refers to a plan or project which ‘*gevolgen kan hebben*’, while the Spanish uses the expression ‘*pueda afectar*’. Each of those versions suggests that the test is set at a lower level and that the question is simply whether the plan or project concerned is capable of having an effect. It is in that sense that the English ‘likely to’ should be understood.¹⁹

47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3).²⁰ The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may be* such an effect.

48. The requirement that the effect in question be ‘significant’ exists in order to lay down a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having *any* effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.

¹⁸ – When the Directive was adopted in May 1992, the official languages of the European Community were Danish, German, Greek, English, Spanish, French, Italian, Dutch and Portuguese. The text of the Directive will thus be authentic in each of those language versions.

¹⁹ – See Case C-1/02 *Borgmann* [2004] ECR I-3219 as regards the need to construe a provision by reference to the purpose and general scheme of the rules of which it forms part where there is a divergence between the different language versions of an EU measure (paragraph 25 and the case-law cited). See also, as regards the difficulties that differences in language versions can give rise to, my Opinion in Case C-173/07 *Emirates Airlines* [2008] ECR I-5237.

²⁰ – An example of the type of confusion that this poorly-drafted piece of legislation can give rise to can, I suggest, be seen in the judgment in *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above. In paragraph 41, the Court talks of an appropriate assessment being required if there is a ‘mere probability’ that there may be significant effects. In paragraph 43, it refers to there being a ‘probability or a risk’ of such effects. In paragraph 44, it uses the term ‘in case of doubt’. It is the last of these that seems to me best to express the position.

49. The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the Court has termed ‘the best scientific knowledge in the field’.²¹ Members of the general public may also be invited to give their opinion. Their views may often provide valuable practical insights based on their local knowledge of the site in question and other relevant background information that might otherwise be unavailable to those conducting the assessment.

50. The test which that expert assessment must determine is whether the plan or project in question has ‘an adverse effect on the integrity of the site’, since that is the basis on which the competent national authorities must reach their decision. The threshold at this (the second) stage is noticeably higher than that laid down at the first stage. That is because the question (to use more simple terminology) is not ‘should we bother to check?’ (the question at the first stage) but rather ‘what will happen to the site if this plan or project goes ahead; and is that consistent with “maintaining or restoring the favourable conservation status” of the habitat or species concerned?’. There is, in the present case, no dispute that if the road scheme is to proceed a part of the habitat will be permanently lost. The question is simply whether the scheme may be authorised without crossing that threshold and bringing into play the remaining elements of Article 6(3) (and, if necessary, Article 6(4)).

51. It is plain, however, that the threshold laid down at this stage of Article 6(3) may not be set too high, since the assessment must be undertaken having rigorous regard to the precautionary principle. That principle applies where there is uncertainty as to the existence or extent of risks.²² The competent national authorities may grant authorisation to a plan or project *only if they are convinced that it will not adversely affect the integrity of the site concerned*. If doubt remains as to the absence of adverse effects, they must refuse authorisation.²³

52. How should the reference in that expression to the ‘integrity’ of the site be construed?

53. Here, again, it is worth pausing briefly to note the differing language versions of Article 6(3). The English-language version uses an abstract term (integrity) – an approach followed, for example in the French (*intégrité*) and the

²¹ – *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above, paragraph 54.

²² – Case C-157/96 *National Farmers’ Union and Others* [1998] ECR I-2211, paragraph 63.

²³ – See, in that regard, *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above, paragraphs 56 to 59.

Italian (*integrità*). Some other language versions are more concrete. Thus, the German text refers to the site ‘*als solches*’ (as such). The Dutch version speaks of the ‘*natuurlijke kenmerken*’ (natural characteristics) of the site.

54. Notwithstanding those linguistic differences, it seems to me that the same point is in issue. It is the essential unity of the site that is relevant. To put it another way, the notion of ‘integrity’ must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned.

55. The integrity that is to be preserved must be that ‘of the site’. In the context of a natural habitat site, that means a site which has been designated having regard to the need to maintain the habitat in question at (or to restore it to) a favourable conservation status. That will be particularly important where, as in the present case, the site in question is a priority natural habitat.²⁴

56. It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is ‘why was *this particular site* designated and what are its conservation objectives?’. In the present case, the designation was made, at least in part, because of the presence of limestone pavement on the site – a natural resource in danger of disappearance that, once destroyed, cannot be replaced and which it is therefore essential to conserve.

57. Lastly, the effect on the integrity of the site must be ‘adverse’. In any given case, the second-stage appropriate assessment under Article 6(3) may determine that the effect of the plan or project on the site will be neutral, or even beneficial. But if the effect is negative, it cannot proceed – by virtue of that provision, at least.

58. What then is a negative or ‘adverse’ effect? Here, it may be helpful to distinguish between three situations.

59. A plan or project may involve some strictly temporary loss of amenity which is capable of being fully undone – in other words, the site can be restored to its proper conservation status within a short period of time. An example might be the digging of a trench through earth in order to run a subterranean pipeline across the corner of a site. *Provided* that any disturbance to the site could be made good, there would not (as I understand it) be an adverse effect on the integrity of the site.

60. Conversely, however, measures which involve the permanent destruction of a part of the habitat in relation to whose existence the site was designated are, in my view, destined by definition to be categorised as adverse. The conservation objectives of the site are, by virtue of that destruction, liable to be fundamentally –

²⁴ – See, in that regard, point 40 above.

and irreversibly – compromised. The facts underlying the present reference fall into this category.

61. The third situation comprises plans or projects whose effect on the site will lie between those two extremes. The Court has not heard detailed argument as to whether such plans or projects should (or should not) be considered to generate an ‘adverse effect on the integrity of the site’. I consider that it would be prudent to leave this point open to be decided in a later case.

62. Let us assume that a plan or project crosses the threshold laid down in the second sentence of Article 6(3). It is then necessary to consider whether it may proceed under Article 6(4). That provision is triggered by ‘a negative assessment for the implications of the site’. Those words must, if Article 6 is to have any sense as a coherent whole, be interpreted so as to mean that paragraph 4 will cut in precisely where paragraph 3 ends, that is to say, once it is found that the plan or project in question cannot proceed under Article 6(3).

63. Article 6(4) is, like Article 6(3), divided into two parts. The first applies to any plan or project which fails to satisfy the requirements of Article 6(3). The second applies only where the site concerned hosts a priority natural habitat type or a priority species.

64. As regards the first – general – set of requirements, the plan or project may proceed only if that is for imperative reasons of overriding public interest and there is no alternative solution.²⁵ In addition, the Member State concerned must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. While the Commission must be informed of the compensatory measures adopted, it does not, as such, participate in the procedure. The legislation recognises, in other words, that there may be exceptional circumstances in which damage to or destruction of a protected natural habitat may be necessary, but, in allowing such damage or destruction to proceed, it insists that there be full compensation for the environmental consequences.²⁶ The status quo, or as close to the status quo as it is possible to achieve in all the circumstances, is thus maintained.

65. The second part is narrower. The grounds on which the plan or project may proceed are more limited and it may be necessary for the competent authorities of

²⁵ – See, in that regard, *Solvay and Others*, cited in footnote 13 above, paragraph 71 et seq.

²⁶ – For an example of steps that do *not* constitute adequate compensatory measures, see point 29 of my Opinion in Case C-388/05 *Commission v Italy* [2007] ECR I-7555, ‘*Valloni e steppe pedegarganiche*’. I leave open the general question as to how to identify what *are* appropriate compensatory measures in any given case.

the Member State concerned to obtain an opinion from the Commission before proceeding.²⁷

66. Whilst the requirements laid down under Article 6(4) are intentionally rigorous, it is important to point out that they are not insuperable obstacles to authorisation. The Commission indicated at the hearing that, of the 15 to 20 requests so far made to it for delivery of an opinion under that provision, only one has received a negative response.

67. Seen in that overall context, it seems to me that any interpretation of Article 6(3) that provides a lower level of protection than that which Article 6(4) contemplates cannot be correct. To require the Member States to ‘take all compensatory measures necessary’ when a plan or project is carried out under the latter provision so as to preserve the overall coherence of Natura 2000 while, at the same time, allowing them to authorise more minor projects to proceed under the former provision even though some permanent or long-lasting damage or destruction may be involved would be incompatible with the general scheme which Article 6 lays down. Such an interpretation would also fail to prevent what the Commission terms the ‘death by a thousand cuts’ phenomenon, that is to say, cumulative habitat loss as a result of multiple, or at least a number of, lower level projects being allowed to proceed on the same site.²⁸

68. The above analysis essentially endorses the line of reasoning put forward by Mr Sweetman, Ireland and the Commission. The Board, the Local Authorities and the United Kingdom adopt a different approach, based closely on the literal wording of Article 6(3). In particular, they emphasise the two-stage process which that provision imposes. Each stage is separate and, they argue, must be understood as having a separate meaning and purpose.

69. I would summarise that alternative approach as follows.

70. In construing Article 6, a line is to be drawn between paragraphs 1 and 2, on the one hand, and paragraphs 3 and 4, on the other. The former exist to govern the day-to-day management of the site. The latter, for their part, deal with plans or projects that are unconnected with that management. They may thus be seen as laying down exceptions to paragraphs 1 and 2. In considering such a plan or

²⁷ – The legislation refers to the Commission’s conclusions being delivered by way of an opinion rather than a decision. They will thus not be directly binding on the parties concerned. It will none the less be open to the Commission to take enforcement action against a Member State which contravenes, or allows others to contravene, its opinion. Alternatively, an aggrieved third party may bring proceedings before a national court seeking an order to the appropriate effect.

²⁸ – Some of the discussion at the hearing turned on whether that phenomenon was one which played a role in determining whether the ‘adverse effect on the integrity of the site’ test under Article 6(3) was met. In my view, it has no role to play in that context. The criteria that are relevant there are those set out in points 50 to 60 above. It is not necessary to go beyond them.

project, it is necessary, first, to consider whether it is likely to have a significant effect on the site. The word ‘likely’ would be construed in that context as comprising a test of probability (albeit based on the precautionary principle – I do not think there is any dispute in that regard). A plan or project that was not considered likely to have a significant effect could proceed, without there being any need for an assessment of its implications.

71. Conversely, where such an effect was predicted, an assessment would be required. In conducting that exercise, and thus determining whether the plan or project ‘adversely affects the integrity of the site’, it would be necessary to bear in mind that that expression must mean more than ‘adversely affects the site’. Equally, the expression ‘adverse effect’ must be understood as carrying a stronger meaning than the phrase ‘significantly affect’ used in the first stage of Article 6(3). If that were not the case, there would be no distinction between the trigger for deciding whether an assessment is required (Article 6(3), first sentence) and the criterion for determining whether a plan or project must be refused permission to proceed (Article 6(3), second sentence).

72. On that basis, the Board argues that the decision to authorise the road scheme at issue in the main proceedings was correctly adopted.

73. The submissions of the parties arguing in support of the approach I have just described are well made. They should certainly not be dismissed out of hand.

74. However, in my view, that approach is not the correct one. In particular, it concentrates on the wording of Article 6(3) read in isolation and fails to take into account the wider context in which that provision must be construed. As a result, it involves an inherent, and irresolvable, tension between allowing certain projects to proceed under Article 6(3), while projects covered by Article 6(4) may go ahead only if full compensatory measures are adopted. It also fails in any way to deal with the ‘death by a thousand cuts’ argument.

75. Those arguments likewise cannot be reconciled with the Court’s case-law laid down in *Waddenvereniging and Vogelbeschermingsvereniging*.²⁹ In holding, in paragraph 35, that Article 6(3) renders superfluous a concomitant application of the rule of general protection laid down in Article 6(2), the Court was not seeking to stress the differences between those provisions. Rather, it chose to emphasise their *similarity*. It was with that point in mind that it went on to observe, in paragraph 36, that ‘authorisation of a plan or project granted in accordance with Article 6(3) of [the Directive] necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely

²⁹ – Cited in footnote 15 above. Where a plan or project subsequently proves likely to give rise to deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error, Article 6(2) will apply so as to ensure that the integrity of the site is restored (see, to that effect, paragraph 37 of the judgment).

to give rise to deterioration or significant disturbances within the meaning of Article 6(2)'. It was for the same reason that the Court held in *Commission v Spain* that Article 6(2) and (3) of the Directive is 'designed to ensure the same level of protection'.³⁰

76. In the light of all of the above, the answer to Question 1 should be that in order to establish whether a plan or project to which Article 6(3) of the Directive applies has an adverse effect on the integrity of a site, it is necessary to determine whether that plan or project will have a negative effect on the constitutive elements of the site concerned, having regard to the reasons for which the site was designated and their associated conservation objectives. An effect which is permanent or long lasting must be regarded as an adverse one. In reaching such a determination, the precautionary principle will apply.

Question 2

77. By this question, the national court asks whether the precautionary principle requires authorisation of a plan or project to be refused if it would result in the permanent non-renewable loss of the whole or any part of the natural habitat in question. It is implicit in the question that the principle concerned may have a separate role to play in the assessment to be carried out by the national authorities under Article 6(3). That is to say, it assumes that, if the principle is not called in aid, a different result might be reached than if it is.

78. I have described the application of the precautionary principle in point 51 above. It is, as the Local Authorities observe, a procedural principle, in that it describes the approach to be adopted by the decision-maker and does not demand a particular result.

79. The Court held in *Waddenvereniging and Vogelbeschermingsvereniging* that the precautionary principle has been integrated into Article 6(3).³¹ It follows, as the United Kingdom observes, that there is no interpretational gap in the scheme of that article to be filled by the application of that principle. It also follows that the fact that the principle is relevant to establishing whether a competent authority can rule out any adverse effect on the integrity of a site does not go to the prior question of what that test means.

80. It is therefore unnecessary to answer Question 2.

³⁰ – Cited in footnote 15 above, paragraph 142.

³¹ – Cited in footnote 15 above, paragraph 58.

Question 3

81. By this question, the national court asks about the interrelationship between paragraphs 3 and 4 of Article 6.

82. I have set out my analysis of that relationship above³² and have nothing to add.

Conclusion

83. In the light of the above considerations, I suggest that the Court should give the following answer to the questions referred by the national court:

In order to establish whether a plan or project to which 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 applies has an adverse effect on the integrity of a site, it is necessary to determine whether that plan or project will have a negative effect on the constitutive elements of the site concerned, having regard to the reasons for which the site was designated and their associated conservation objectives. An effect which is permanent or long lasting must be regarded as an adverse one. In reaching such a determination, the precautionary principle will apply.

³² – See point 62 et seq.