[2023] IEHC 403

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

RESPONDENT

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

NOTICE PARTIES

(No. 4)

JUDGMENT of Humphreys J. delivered on the 13th day of July, 2023

Judgment history

1. In *Toole v. Minister for Housing and Others (No. 1)* [2023] IEHC 263 (Unreported, High Court, 22nd May, 2023), I granted an interim stay on the foreshore licence impugned in the proceedings.

2. In *Toole v. Minister for Housing (No. 2)* [2023] IEHC 317 (Unreported, High Court, 16th June, 2023), I continued the stay on an interlocutory basis.

3. In *Toole v. Minister for Housing (No. 3)* [2023] IEHC 378 (Unreported, High Court, 3rd July, 2023), I dismissed the case save as to two points, refused the application to dismiss those or to reduce them to declaratory issues only, and invited further submissions.

4. The present judgment should be read in combination with those judgments.

5. I am now dealing with step (iv) in the decision algorithm set out at para. 51 of the No. 3 judgment, which following detailed written submissions from the parties, essentially involved three issues:

(i) whether the No. 3 judgment should be amended as regards the table of projects considered;
(ii) what order, if any, should be made in respect of sub-issue F, the alleged inadequacy of the condition regarding in-combination effects; and
(iii) what order, if any, should be made in respect of sub-issue E, the alleged inadequacy of consideration of in-combination effects with respect to pending projects.

Procedural history

6. Simultaneously with delivery of the No. 3 judgment, the matter was listed on 3rd July, 2023, and simultaneous submissions were directed to be delivered by 7th July, 2023, and that was done by all parties. Provision was made for simultaneous replying submissions by 10th July, 2023, but in fact none of the parties took up the option for such replying submissions. The present module was heard on 10th July, 2023. At the hearing, the State suggested an alternative wording for any amendment to the licence that might be ordered or agreed. In addition, the applicants asked for liberty to put in a further affidavit exhibiting a letter of 22nd June, 2023 from solicitors for the developer in the Codling Bank projects. At the conclusion of that hearing, it was directed that the No. 3 judgment be amended as set out below, and that the applicant could exhibit certain further correspondence without prejudice to the relevance of that correspondence. Judgment was reserved on the other issues.

Issue 1 – Table of projects considered

7. The hearing of the present module began with a request from the developer to modify the table in the No. 3 judgment to record that the Innogy licence for Site Investigation – Dublin Array at Kish and Bray Banks (FS007029) was considered in the AA screening process. That contention certainly wasn't made clear at the hearing, and indeed the agreed table and some oral submissions expressly stated to the contrary. The argument as to why, contrary to that, the licence *was* considered is as follows.

8. Starting with the IEC screening report of May 2022, that begins as follows at p. 2:

> "Arup with Hartley Anderson Limited have been commissioned by the Department of Housing, Local Government and Heritage (DHLGH) to conduct a Screening for Appropriate Assessment (AA) (stage 1 screening for the likelihood of significant effects on Natura 2000

sites), from an application by RWE Renewables Ireland Limited (RWE) for a Foreshore Licence to undertake site investigation works in relation to the proposed Dublin Array offshore wind farm development (Reference No. FS007188). The purpose of the proposed site investigations are to collect geophysical, geotechnical, ecological and metocean data from the proposed array area, export cable corridors and related landfalls."

9. Hence where the papers refer to reports by Hartley Anderson, or to Arup, or to the IEC, they are referring to the same thing.

10. Submission no. 11 recorded in the IEC screening report of May 2022 at p. 54 includes the following:

> "Cumulative Impact:
> The current license application appropriate assessment fails to take into account properly or at all the cumulation of the impact of the project with the impact of other existing and/or approved projects contrary to article 4(3) and Annex III.
> Granting of this license would be a breach of article 4(4) by failing to ensure that the project was properly described in terms of cumulation of impacts.
> The cumulative impact of the granting of multiple licenses in the area for surveys such as these will have a cumulative impact which has not been appropriately assessed. As such, granting of this license would constitute a breach of the habitats directive. No cumulative assessment has been made of the very real possibility that two developers could be conducting similar site survey work including boreholes and cone penetration tests in the same area at the same time.
> In combination effects the applicant only considers synchronous events and synchronous licenses/leases and do [*sic*] not give any consideration to prolonged repetitive surveying, dredging and noise in the area, impacted by past licenses/surveys, such as their own previous surveys as recently as 2019. In fact, it is not made clear in the application why repeated benthic grabs/trawls is required and may cause significant impact to benthic communities."

11. At p. 53 of the IEC screening report, the following is recorded as the licence applicant's (RWE's) response:

> "The Applicant referred to the Supporting Information document, 2.4.13, that stated the subtidal benthic monitoring will include video and camera stills imagery prior to undertaking grab sampling. In addition to the use of video and camera at each site, the location of sites will be informed by analysis of the geophysical data, in line with guidance and best practice this will provide a robust and informed sampling array which will avoid damage to sensitive habitats.
> The Applicant noted it has committed to mitigation proposed for marine mammals in accordance with the relevant Irish guidance (DAHG, 2014), as agreed with NPWS. A qualified and experienced Marine Mammal Observer will monitor for the presence of marine mammals before the commencement of sound producing activities (pre-watch), during ramp up procedures and following breaks in sound output, as defined in DAHG, 2014. Sound producing activities will not commence until the monitored zone, as defined has been clear for the period required under the guidelines. The purpose of the pre-watch is to monitor for the presence of marine mammals within an area of 1,000m radial distance from the location of the sound source prior to commencement of sound producing activity. DAHG, 2014 guidance requires a prewatch period of at least 30 minutes. The extended prewatch, during the months of May to September inclusive, was requested by NPWS in relation to survey works proposed under Foreshore Licence FS007029. If calves have been spotted in the monitored zone the sound producing activity shall not commence until at least 45 minutes have elapsed with no marine mammals detected within the monitored zone by the Marine Mammal Observer. The delay recognises the slower swim speed of mothers with calves compared to adults alone and allows additional monitoring time to ensure they have left the area of possible disturbance."

12. A further response is set out at pp. 60-61 of the IEC screening report:

> "The Applicant noted that section 7.4 of the Report to Inform Appropriate Assessment Screening provides a screening of projects and plans within a 30 km buffer of the Foreshore Licence area.
> Section 4.3 of the NIS provides the assessment for those projects screened in for combination assessment. Using the precautionary approach projects were screened in for further assessment where there was, in the absence of definitive timings, potential for overlap both temporally and spatially with the surveys subject to this application. Consideration was given to the likelihood for all projects to be undertaken sequentially or simultaneously. Further to these assessments, it was concluded that there will be no

potential for adverse impacts on the integrity of the European sites concerned as a result of the project alone or in combination with other plans or projects.

The Applicant highlighted the Natura Impact Assessment of the surveys which were the subject of an earlier Foreshore Licence, FS007029 concluded that there was no potential for adverse effects on the integrity of the concerned European Sites to arise as a result if [*sic*] the proposed survey activities. The surveys which have been undertaken in 2021 under Foreshore Licence FS007029 include geophysical surveys, ecological grab sampling and the deployment of buoys for the collection of wind, wave and current data. No further works under FS007029 will be undertaken and therefore there is no potential for temporal overlap with the surveys proposed under this current licence application.

The Applicant concluded that the observations raised regarding 'Article 4(3) and Annex III' and an alleged breach of 'Article 4(4)' are not fully understood as those references do not appear to be to the Habitats Directive. Insofar as the reference is to the EIA Directive, the site investigations are not a project type to which that Directive applies."

13. Thus the developer's position as recorded in the IEC screening report was that the in-combination effects of the project with the previous Innogy licence were considered and there would not be such effects, not least because no further works would be carried out under the Innogy licence.

14. The IEC screening report contains the following at p. 133:

"A number of responses raised concerns about the potential for cumulative effects from multiple surveys, the use of mitigation (relevant to the NIS rather than the screening), the interpretation of the conservation objectives (specifically in relation to the survey introducing a barrier effect to harbour porpoise), and uncertainty in relation to how well defined the proposed survey is (e.g. the specific locations of benthic samples which will be informed by the geophysical/geotechnical survey results and drop down video).

It is considered that the Applicant has adequately responded to the concerns raised at the AA screening stage. The Applicant outlined a range of commitments in response to the public consultation, and these will be considered further in the Appropriate Assessment."

15. The September 2022 Stage 2 IEC report states at p. 93:

"The Natura Impact Assessment of the surveys which were the subject of an earlier Foreshore Licence, FS007029 concluded that there was no potential for adverse effects on the integrity of the concerned European Sites to arise as a result if [*sic*] the proposed survey activities.

The surveys which have been undertaken in 2021 under Foreshore Licence FS007029 include geophysical surveys, ecological grab sampling and the deployment of buoys for the collection of wind, wave and current data. No further works under FS007029 will be undertaken and therefore there is no potential for temporal overlap with the surveys proposed under this current licence application, nor residual effects to be assessed."

16. The ministerial decision on AA (Appropriate Assessment Determination on Foreshore Application FS007188 RWE Renewables Ireland Ltd., Site Investigations for the proposed Dublin Array offshore wind Farm) includes the following:

"Appropriate Assessment

The Appropriate Assessment Screening process determined that likely significant effects on Annex I marine habitats and Annex II species of marine mammals from Rockabill to Dalkey Island SAC, South Dublin Bay SAC and Lambay Island SAC could not be discounted as a result of direct disturbance on habitats, underwater noise and increased vessel traffic from the proposed works.

Likely significant effects could not be ruled out with respect to all sources of potential effect for North Bull Island SPA and South Dublin Bay and River Tolka Estuary SPA.

Therefore a stage 2 Appropriate Assessment was required.

The IEC, Arup, completed an 'Appropriate Assessment Report', (Tab 19) and identified the mitigation measures required to ensure that the proposed site investigation works, individually or in combination with other plans or projects will not adversely affect the integrity of any Europeans [*sic*] Site.

The 'Marine Advisor's Environmental Assessment and Determinations Report' of 28 September 2022 considered all the information submitted in support of this application and accepts the the [*sic*] conclusion and recommendations. ..."

17. To the extent that the Minister refers to the IEC AA report (that is, the stage 2 report of September, 2022), that in context must be taken as an implied consideration of the matters referred to in that report, which is closely linked to the IEC screening report.

18. On this logic it is legitimate to conclude that the Innogy licence was impliedly considered by the Minister in making a decision on AA. "Impliedly" is not an entirely empty qualification but it is

enough for present purposes and I have amended the table set out in the No. 3 judgment accordingly (along with making some minor consequential and drafting changes).

Issue 2 – The terms of the condition regarding in-combination effects (core ground 10 sub-issue F)

19. The No. 3 judgment found in effect, with some potential caveats in the event of further submissions, that the Minister had accepted the report of the MLVC that there was a need for a condition ensuring a lack of temporal overlap with other consented projects, but did not incorporate that condition in the final licence.

20. The MLVC Report states in section 9.0:

> "Given the existence of other licences in this general area, it is considered prudent in the interests of mitigating the possible cumulative environmental effects that the applicant be required, in the event of a licence being granted, to coordinate with other licence holders that overlap with the survey area as submitted to ensure that no temporal overlap between two or more projects occurs. It is considered that this requirement shall form part of the notification condition."

21. Condition 31.13 of the Licence states:

> "The Licensee shall liaise with the Department of Housing, Local Government and Heritage and use their best endeavours to liaise with the holders of Foreshore licences for other surveys and site investigations to be undertaken in the vicinity of the Foreshore Licenced Area the subject matter of this Licence."

22. Hence the recommendation, accepted by the Minister, that it should be a "notification condition" that the licensee would be "required" to co-ordinate with other licence holders "to ensure" no temporal overlap, is not in fact reflected.

23. Relevant here is the power to amend the licence at para. 8.2 of the licence itself:

> "8.2 The Specific Conditions may be amended from time to time:
>
> 8.2.1 by agreement between the parties;
>
> 8.2.2 by the Licensor by notice in writing to the Licensee if the Licensor reasonably considers it necessary to do so for reasons of public safety or protection of the environment."

24. This brings into play the doctrine in *Pembroke Road Association v. An Bord Pleanála, The Minister for Housing, Local Government and Heritage* [2021] IEHC 545, [2021] 7 JIC 2912 (Unreported, High Court, Owens J., 29th July, 2021) at paras. 26 and 27, to the effect that if a technical infirmity in a decision can be corrected by amendment, then the court can allow that to be done rather than quash the decision outright.

25. The State responded positively to that concept, while obviously retaining its preference for no compulsory order, stating in its written submissions:

> "8. The Respondent believes that the power of amendment is capable of dealing with the issue identified by the Court and is prepared to utilise that power accordingly, in order to ensure that the recommendation of the Marine Licence Vetting Committee ('MLVC') in its report is fully implemented (as was his intention)."

26. The applicants argued that the MLVC recommendation was as stated, and that this was defective for the reasons set out in the judgment. The State describe this as a "trick of language" and in fairness there is something in that complaint. At best, the applicants are making a different point to the point addressed in the No. 3 judgment, which is the lack of correspondence between the reasoning and the text of the decision regarding the decision.

27. The applicants also went on to say that the proposed amended condition was insufficient and that the AA would need to be re-done prior to the grant of the licence as follows from art. 6(3) of the habitats directive and the decision of the CJEU in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij, Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA* (Court of Justice of the European Union, 7th September, 2004, ECLI:EU:C:2004:482). This was argued to militate in favour of *certiorari*, distinguishing the matter from *Pembroke Road Association v. An Bord Pleanála* which involved a technical error. It was submitted that the court "can't fix the AA" without impermissibly "standing in the shoes of the Minister". Hence it was submitted that "there can't be any shortcuts to this".

28. The problem with all of that is that it goes well beyond the actual remaining issue under this heading. That issue is essentially a technical one as to a mis-match between the reasoning and the decision. Correcting that doesn't necessarily totally eliminate the more substantive issue as to the AA process addressed in sub-issue E. The effect on sub-issue E would need to be argued and there will be a further opportunity to do that in the next module.

29. The State suggested the following amended wording for the condition:

> "In the interests of mitigating possible in-combination environmental effects, the Licensee shall coordinate with other licence holders that overlap with the survey area to ensure that

no temporal overlap between two or more projects occurs. Where necessary, the Minister will determine the timing of activities to ensure that there is no temporal overlap."

30. In view of the State's response to this point, it seems that the only real issue should be the form of the order. The options are an adjournment *simpliciter*, a declaration, *mandamus* or *certiorari*. On balance, I think that as in *Pembroke Road Association v. An Bord Pleanála*, *certiorari* would be excessive given that the matter can be corrected. The preference for facilitating or directing the amendment of a decision rather than quashing it is essentially a separation of powers issue. At the more passive end of the spectrum of options, the disadvantage with an adjournment or a declaration is the risk of further contention arising, and thus the potential for further procedural complication and delay, especially where this matter has been dealt with at pace to date and with a looming further urgent hearing on the issue of whether the stay is to be continued. Clarity, legal certainty, expedition and avoiding any loose ends are strong considerations here in favour of an effective order that will simply knock this issue on the head with finality and without any further intervention of the court being required. There is the reinforcing factor that there was no strenuous objection to such an order.

31. The State submitted at para. 33(b) of written submissions of 10th July, 2023 that:

"If the Court were so minded, the Respondent would be amenable [to] an adjournment or to the Court granting declaratory relief and/or an order of mandamus, with a view to the Respondent exercising his power of amendment (under Clause 8.2) of Condition 31.13 of the Licence, to reflect the recommendation of the MLVC."

32. While both the State and notice party seemed relatively restrained in opposition to, if not mildly acquiescent regarding, an order of *mandamus* as opposed to their preferred option of an adjournment or a declaration, the notice party did point out a lack of a demand and refusal which should ground an application for *mandamus* (see de Blacam, *Judicial Review*, 3rd ed. (Dublin, Bloomsbury, 2017), p. 677). That said, Ms Heffernan's third affidavit includes the following complaints:

"89. … In any event, the conditions which were attached to the Licence by the Minister are also ineffective in mitigating the potential in-combination effects arising from the spatial and temporal overlap of effects arising from the activities the subject of the Licence and similar licensed activities. In particular, condition 31.13, provides that:

'The Licensee shall liaise with the Department of Housing, Local Government and Heritage and use their best endeavours to liaise with the holders of Foreshore Licences for other surveys and site investigations to be undertaken in the vicinity of the Foreshore Licensed Area the subject matter of this Licence' ...

90. While this condition appears to acknowledge the potential for in combination effects it does not require the Licensee to take any steps in relation to the mitigation of potential in combination effects. Having considered the email correspondence exhibited by RWE in this matter concerning condition 31.13, it is apparent that this condition is ineffective in dealing with potential in-combination effects where there is a spatial and temporal overlap between the activities permitted under the Licence and similar licensed activities. …"

33. While not phrased as a demand, that is certainly an acceptably clear complaint, on behalf of the applicants, which up to the No. 3 judgment the State declined or at least failed to address. Even bearing in mind that that came after the institution of the proceedings, that clear complaint satisfies the essential purpose served by the *desideratum* (not an absolute requirement in any event) of a demand and refusal.

34. The appropriate order for all of those reasons is one of *mandamus*, and the wording of that order is set out below.

35. Finally, I agree with the notice party that there isn't any need for a requirement for public participation to be directed as part of this process. That is for two reasons – firstly because the correction of the wording is one to align the decision with the reasoning and is essentially technical, and relatedly it is meant to actually implement the reasoned result of the public participation, not to introduce a new requirement which itself requires new public participation.

36. I should also note that the grant of *mandamus* means that I can formally refuse *certiorari* in relation to sub-issue F. That relief remains a possibility as regards sub-issue E, to which we now turn.

Issue 3 – Failure to consider pending projects (core ground 10 sub-issue E)

37. The issues under this heading at this stage are whether I should decide this myself and if so how, or whether the question should be referred to the CJEU and if so whether that should be on the basis of a possible order of *certiorari* or a declaration.

38. The basic dispute under this heading is an absolutely textbook example of when a reference should be granted, namely where there is a clear rift in interpretation as between a member state and the European Commission regarding the meaning and effect of a directive. That is a classic instance where a uniform interpretation of EU law by the Luxembourg court is required.

39. The State candidly and helpfully said that it was accepted on all sides that there was no decision of the CJEU as to which of the two alternative interpretations was correct. Again this reinforces the case for the reference.

40. The applicants' basic position under this heading is that the court should grant *certiorari* of the licence on the grounds of failure to consider pending projects, or failing that should refer the matter to the CJEU. The submissions of 7th July, 2023, state *inter alia*:

> "7. On sub-issue (e), the Applicants' position remains that the Minister was under an obligation to take account of the potential for in-combination effects arising from relevant pending projects in the Appropriate Assessment ("AA") and that this obligation arises from Article 6(3) of the Habitats Directive. As the Minister excluded any consideration of such projects in limine, the Applicant's position is that the Foreshore Licence should be quashed.
> 8. The EU Commission and Departmental guidance on appropriate assessment support the Applicants' interpretation of Article 6(3) in this regard.
> 9. By contrast, the Minister is opposing the EU Commission and Departmental guidelines and suggests that no such obligation arises. There is an obvious lack of consistency in the approach being taken by the Minister in this regard. By analogy, in the recent 'State Litigation Principles' prepared by the Attorney General, principle no.9 provides:
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> > '9. Be consistent across claims
> > With due regard for differences between individual cases, or classes of cases, the State shall endeavour to be consistent in how similar proceedings are managed and settled.'
>
> 10. It would appear that the Minister would expect other bodies to take account of the Departmental guidance and take into account pending projects but that for some reason, it does not have to follow that guidance or EU Commission guidance for that matter.
> 11. 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 possibility 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 potential for such risks to arise was not considered by the Minister because the relevance of pending projects to in-combination assessment for the purposes of AA was excluded in limine. Moreover, while the precise terms and conditions of a consent cannot be predicted with certainty, the in-combination effects of pending projects can be assessed in the context of the activities and/or works in respect of which consent is sought and the mitigation measures proposed, which typically become enshrined in conditions.
> 12. It is, therefore, the Applicants' position that the Court should interpret Article 6(3) of the Habitats Directive as including a requirement to take account of pending projects during AA.
> 13. In essence, the Applicants submit that the Court should follow the EU and domestic guidance. However, and as addressed below, if the Court were to have reservations as to whether the scope of Article 6(3) AA encompasses assessment of the in-combination effects of other pending projects, it is submitted that the Court ought to refer appropriate questions to the CJEU, as indicated in its judgment.
> ….
> 15. It is the Applicants' position that an order of certiorari should be granted in respect of both sub-issue (e) and (f) under Ground 10. However, if the Court were to consider that the question as to whether AA requires in-combination assessment of pending projects (i.e. sub-issue (e)) was not acte clair, it is submitted that the Court should make a preliminary reference to the CJEU on this point.
> 16. In circumstances where the Applicants have a right of appeal from this Court, the High Court has discretion to make a reference under Article 267 TFEU:
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> > 'Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.' ...
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> 17. As set out in the 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings' (2019/C 380/01):
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> > '5. A reference for a preliminary ruling may, inter alia, prove particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts.' ...
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> 18. It does not appear to the Applicants that the CJEU has adjudicated on whether or not an AA under Article 6(3) of the Habitats Directive must consider the in-combination

effects of pending projects although the guidance from the European Commission has clearly interpreted the obligation under Article 6(3) to include an obligation to assess pending projects (see §130-§135 of the Judgment). While it is the Minister's position that there is no such obligation, it does so in defiance of its own government's guidelines. The Minister has not pointed to any case law to demonstrate that pending projects are not required to be taken into consideration in AA."

41. The State in submissions did acknowledge the discretion of the court as to a reference:

"32. However, the Respondent acknowledges that the decision to make a preliminary reference is entirely one for the Court. In this regard, in Case C-318/00 Bacardi-Martini SAS EU:C:2003:41, the CJEU stated (§41):

'It is settled case-law that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.'"

42. Indeed a similar sentiment is contained in the judgment in Case C-166/22 *Hellfire Massy Residents Association v. An Bord Pleanála* (Court of Justice of the European Union, 6th July, 2023, ECLI:EU:C:2023:545):

"23 The Irish authorities and the Polish Government contend that the present request for a preliminary ruling is inadmissible on the ground, in essence, that it relates to points of law which are based on a hypothetical scenario.

24 In that regard, it should be noted that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court of Justice. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (judgment of 21 March 2023, Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices), C-100/21, EU:C:2023:229, paragraph 52 and the case-law cited).

25 It follows that questions relating to EU law enjoy a presumption of relevance. The Court of Justice may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court of Justice does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 21 March 2023, Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices), C-100/21, EU:C:2023:229, paragraph 53 and the case-law cited).

26 In this instance, it should be noted that the present request for a preliminary ruling was submitted to the Court in the context of an action seeking, inter alia, (i) the quashing of the decision of 25 June 2020 and (ii) a declaration that Regulations 51 and 54 of the 2011 Regulations are invalid.

27 However, it is apparent from that request for a preliminary ruling, as well as from the file before the Court, and, in particular, from the referring court's judgment of 2 July 2021, that, although the referring court has already rejected the ground of challenge of the action seeking the quashing of the decision of 25 June 2020 and, in that respect, has also rejected the ground of challenge alleging the invalidity of Regulations 51 and 54 of the 2011 Regulations as regards the effect of the potential invalidity of those provisions on the legality of the procedure for adopting that decision, that court still has to rule on that ground of challenge to the extent that it concerns the situation following the adoption of the abovementioned decision.

28 In those circumstances, the request for a preliminary ruling must be regarded as admissible."

43. That judgment was also notable for the context that a reference is not moot or hypothetical merely because it is linked to a possible declaratory relief, at least where that was the case from the outset.

44. The State makes the valid point that reference is discretionary rather than mandatory:

"30. It is also notable that the Court does not have the same obligation to refer in respect of a question concerning the interpretation of EU law as a court of last resort.

31. In this regard, the CJEU in Case C-561/19 Consorzio Italian Management EU:C:2021:799 stated (§66):

> '…a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to bring before the Court a question concerning the interpretation of EU law that has been raised before it, unless it finds that that question is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.'"

45. Which is fine, but I'm considering referring the matter because I think it is properly referrable and that a reference is desirable and appropriate, not because I think I have to do so.

46. The State's submissions also contain the following:

> "28. It is submitted that, in light of the submissions above, recourse to a preliminary reference is not necessary to enable the Court to decide this case.
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> 29. In Case C-470/12 Pohotovosť EU:C:2014:101, the CJEU stated (§29):
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> 'The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute…'"

47. The problem with that argument is that the premise of that submission is that this is an advisory opinion because there can't be any in-combination effects given the fact situation. But the conclusion doesn't flow from the premise, and the premise hasn't been accepted anyway. I am effectively postponing a decision on the argument that there aren't going to be any in-combination effects in practice until the stay stage, when it can be looked at properly in the light of the state of play in the light of the outcome of the first series of modules. But even assuming for the sake of argument that the opposing parties are right that there is no longer (or even never was) any such risk, the need for a declaration as to the correct legal position remains. It can't be acceptable that the State should propagate a legal theory in conflict with its own guidance and Commission guidance without that being definitively resolved, at least by declaration.

48. Similarly, the notice party argues that there is a lack of factual information justifying a reference or particularly evidence that the point would have made any difference. They argue by analogy with Case C-254/19 *Friends of the Irish Environment Ltd. v. An Bord Pleanála* (Court of Justice of the European Union, 9th September, 2020, ECLI:EU:C:2020:680) that the issue is hypothetical. The CJEU in that case stated:

> "The fourth question
>
> 60 By its fourth question, the court asks, in essence, whether the answer to the first to third questions differs according to whether a development consent for a project imposes a time limit for the operational phase or sets a time limit only for the construction phase thereof, provided that the works are completed within that time limit.
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> 61 It is important to note, in that regard, that a distinction between those two types of consent appears to have no bearing on the dispute in the main proceedings.
>
> 62 Consequently, since the justification for the reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute (judgment of 26 March 2020, Miasto Łowicz and Prokurator Generalny, C-558/18 and C-563/18, EU:C:2020:234, paragraph 44 and the case-law cited), the fourth question must be declared inadmissible.
>
> The fifth question
>
> 63 By its fifth question, the referring court asks to what extent, if any, the obligation of a national court to interpret national legislation in so far as possible in accordance with the provisions of the Habitats Directive and the Aarhus Convention is subject to a requirement that the parties to the main proceedings have expressly raised those interpretive issues. Specifically, if national law provides two decision-making processes, only one of which complies with the Habitats Directive, the referring court asks whether a national court is obliged to interpret national legislation to the effect that only the compliant decision-making process can be invoked, notwithstanding that such interpretation has not been expressly pleaded by the parties in the case before it.
>
> 64 According to the Court's settled case-law, it is solely for the national court before which the dispute in the main proceedings has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (judgment of 19 December 2019, Junqueras Vies, C-502/19, EU:C:2019:1115, paragraph 55 and the case-law cited).
>
> 65 It follows that questions referred by national courts enjoy a presumption of relevance and that the Court may refuse to rule on those questions only where it is apparent that the interpretation sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or

> legal material necessary to give a useful answer to those questions (judgment of 19 December 2019, Junqueras Vies, C-502/19, EU:C:2019:1115, paragraph 56 and the case-law cited).
>
> 66 However, it should be pointed out at the outset that the fifth question referred does not set out in sufficient detail the provisions of the Aarhus Convention whose interpretation is sought.
>
> 67 It is also apparent from the order for reference and the written observations submitted to the Court that that question is raised because the referring court wishes to point out that the provision of national law on the basis of which the consent at issue in the main proceedings was granted is erroneous on the ground that there is another provision, namely section 42 of the PDA 2000, which, interpreted in the light of Article 6(3) of the Habitats Directive, complies with EU law. However, that error of law was not pleaded by the applicant in the main proceedings and cannot, therefore, be raised of its own motion by the referring court.
>
> 68 It follows that the fifth question referred centres in fact on whether a national court may rely on an interpretation of a provision of national law that is consistent with EU law in order to raise of its own motion the incompatibility with EU law of another provision of national law that serves as the legal basis for the consent at issue in the main proceedings.
>
> 69 However, as the Advocate General pointed out in points 61 and 68 of her Opinion, it is not apparent why the referring court should seek to establish the correct legal basis for the consent at issue in the main proceedings if it finds in any event that that ... consent was granted in breach of Article 6(3) of the Habitats Directive, given that, moreover, as far as can been seen from the file before the Court, Friends of the Irish Environment has in fact asserted that Article 6(3) of the Habitats Directive was infringed.
>
> 70 It is important to add that it is not clear from the order for reference whether Irish law prohibits in all cases a national court from raising of its own motion pleas in law which have not been raised by an applicant.
>
> 71 It follows that the Court does not have before it the factual or legal material necessary to give a useful answer to the fifth question referred and that, as a result, that question is inadmissible."

49. But the claimed analogy is a misconception and the same response applies. The question here is about the legality of the process adopted. On that process issue there is a clear conflict between the parties and a clear issue to be decided. Even assuming in favour of the opposing parties that any risk of in-combination effects can be excluded, or that at some date between now and the judgment of the CJEU, the question of *certiorari* falls away (for example, if the licence is revoked or surrendered, or is implemented such that it becomes effectively spent), the question of declaratory relief which is the focus of the reference from the outset remains live.

50. As follows from the No. 3 judgment, rule of law considerations militate in favour of clarification of the law, which at a minimum can be done by declaration, in circumstances such as a conflict between government practice and Commission guidance, and indeed between government practice and government guidance.

51. The punchline is that the applicants' proposed question for reference is an appropriate one to refer and is necessary for the determination of the proceedings. It classically involves a question of interpretation rather than application of European law. The question is:

> "Whether 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 ('the Habitats Directive') has the effect that the competent authority is obliged to take into account the effects of other proposed projects (i.e. for which an application for approval or consent has been submitted but not determined) in combination with the effects of the project in respect of which development consent is sought."

52. I can deal with the formal order for reference on the papers and will give the parties 7 days to make written submissions as to matters such as relevant materials and their proposed answers, in line with *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021) albeit simultaneously rather than sequentially.

53. It should be recalled that the applicants have sought a general declaration here in the terms prescribed by Practice Direction HC119, para. 70:

> "If or to the extent that an applicant wishes to claim declaratory relief in some respect not covered by the foregoing, an applicant may plead a fall-back relief along the lines of: 'Such declaration(s) of the legal rights and/or legal position of the applicant and persons similarly situated and/or of the legal duties and/or legal position of the respondent as the court considers appropriate', or a relief to the like effect."

54. Relief 2 in the present case claims:

"2. Such declaration(s) as to the legal rights and/or legal position of the Applicants and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Board as the court considers appropriate."

55. That contains an obvious typo ("Board" should read "Minister") and we may need to consider whether that should be formally amended.

56. But sticking with the basic point regarding the general declaration, the reason why the statutory practice direction (issued under s. 11(12) and (13) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020) is in those terms is that experience has shown that if applicants are encouraged, or worse still, required, to positively plead specific declarations regarding the legal position, this simply leads to endless florid pages upon pages of exotic and detailed reliefs, almost all of which replicate possible grounds for *certiorari*. Only occasionally will a court in fact see fit to grant a declaration in lieu of or alongside *certiorari*, and again experience has shown that when that arises, it is virtually never in the form originally sought. Major surgery is normally required on any proffered text. The Practice Direction serves the needs of concision and simplicity, and saves time and costs, by postponing the issue of the wording of any declaration to the point (if any) when it needs to be considered. Normally that point never comes. But it may come here.

57. If that happens, such a declaration would not be made moot even if the licence was terminated or spent. The declaration could simply be to the effect that the State guidelines do, or do not, correctly represent the legal position. Even if the guidelines were revoked or replaced to remove the wording that supports the applicants' position (and I may be proved wrong but I can't imagine that the State would do something as drastic as that simply to score a point in this case), the declaration could be simply one as to what the correct legal position is. Events may be able to render a *certiorari* claim moot but, at the level of principle at least, not a declaratory claim, which enjoys a flexibility of language and can orient itself to the past, present or future such that it can easily retain its relevance no matter what happens between now and a future judgment of the CJEU.

58. All that said, I don't see any pressing basis at this stage to revisit the decision not to limit sub-issue E to a declaration. But nor do I need to make any absolutely final decision on that either, so it can be revisited if needs be when we are dealing with the stay. That may be the relevant time to address the points made regarding the Marine Notices, but I can note at this point that there are three relevant Marine Notices providing for the start of the allegedly overlapping works. Marine Notices Nos. 16 and 24 relate to RWE and what I am told are its subsidiaries by way of special purpose vehicles (Kish Offshore Wind Ltd and Bray Offshore Wind Ltd) which are apparently collectively referred to as Kish consortium. Marine Notice No. 24 provides that Kish Offshore Wind Ltd and Bray Offshore Wind Ltd had given notice of geotechnical investigations regarding the Dublin Array project from 29th April, 2023 to late May, 2023. The vessel concerned will be the Voe Vanguard, call sign MBEN9. Marine Notice No. 28 is dated 13th April, 2023 and is in favour of the Codling Bank developers and allows Codling Wind Park Ltd to carry out site investigations between 8th May, 2023 and late July, 2023 using the Dutch Pearl, call sign PBZP, and the Excalibur, call sign YLKQ5. Solicitors for the Codling bank developers have indicated somewhat vaguely in a letter of 22nd June, 2023, that they are relying on both the Codling I and Codling II licences. That probably implies that the works carried out under Marine Notice No. 28 will be under both, but it isn't exactly clear. It does specifically refer to the Marine Notice of 13th April, 2023, which is the date of Notice No. 28.

59. As the applicants point out, AA requires scientific certainty in the application of best scientific knowledge, and the in-combination effects in conjunction with the Codling II licence were not considered prior to the grant of the licence.

60. The question of whether I could be satisfied that there was no risk of damage to the environment in general or European sites in particular such that one could comfortably reduce the relief to being one of a declaration is possibly the wrong question in that context. The more practical question is whether the stay should be continued, which depends on a number of things, in particular:

(i) whether the assessment of environmental risk should be made by reference to the material actually before the decision-maker, or matters that the decision-maker was autonomously obliged to consider irrespective of whether they were otherwise put before him (*ex tunc* assessment), or whether it can be based on current evidence (*ex nunc* assessment);

(ii) whether the assessment of environmental risk should be made by reference to the amended condition 31.13 which I am now directing;

(iii) whether the assessment of environmental risk should be made by reference to the question of scientific doubt as regards effects on a European site having regard to best scientific knowledge, or alternatively to any risk to any element of the environment;

(iv) whether the assessment of environmental risk should be made by reference only to the three projects that were pending as of the date of grant of the licence, or to any pleaded relevant environmental risk whether a remaining live ground of challenge or not (but potentially one that could be rendered live on appeal), or by reference to any environmental risk whether pleaded or otherwise; and

(v) the level of environmental risk depending on the foregoing as a factor in assessing the risk of injustice.

61. So phrased, that is a freshly emerging question which the parties simply have not had a clean opportunity to address evidentially, so the appropriate approach is to give liberty to file any further affidavit if the parties wish to take that up.

62. One can see a potential debate about who carries the burden of proof on the question of environmental risk, where an applicant has made some headway with establishing error or potential error, but I don't think I can decide that right now without further argument. To avoid anything that would pre-empt that, I think the best solution is to allow simultaneous affidavits on the issue.

63. I am not ruling out any other procedural applications not already on the radar screen that parties may wish to make, but they will need to make any such requests as explicitly and as urgently as possible. There is always a balance between availing of procedures in depth versus facilitating proceedings continuing at pace. The parties are the best judges of that in the first instance, and the court is there to consider, within its finite resources and subject to competing demands on its attention, such matters if any as emerge from that process.

64. So while the *certiorari* relief will have to remain live, at least for the moment, what is more immediately important is how the post-hearing stay is addressed, which is the focus of the next module. In such circumstances I can say that the reference to the CJEU will be primarily on the basis of a declaration, which will remain the position whatever happens hypothetically to other relief. On that basis I think I can adjourn the *certiorari* claim generally with liberty to re-enter. It will remain formally alive for the time being but is not essential to or the basis of the reference.

Order

65. The order made on 10th July, 2023 was that:

(i) the No. 3 judgment be amended as set out above; and

(ii) without prejudice to the relevance of the correspondence, the applicant have liberty to file an affidavit by 12th July, 2023, exhibiting correspondence to the solicitors for the Codling Bank developers of 1st and 8th June, 2023, and their reply of 22nd June, 2023.

66. For the reasons set out in the judgment, it is now ordered that:

(i) there be an order of *mandamus* addressed to the respondent requiring that prior to any further steps being taken on foot of the licence the respondent should endeavour to put in place an agreed amendment of licence with the first named notice party, or if such agreement cannot be reached, should himself put in place an amendment, pursuant to para. 8.2 of the licence, to the effect that condition 31.13 should be replaced by a wording along the lines that:

> "In the interests of mitigating possible in-combination environmental effects, the Licensee shall coordinate with other licence holders that overlap with the survey area to ensure that no temporal overlap between two or more projects occurs. Where necessary, the Minister will determine the timing of activities to ensure that there is no temporal overlap.";

(ii) a mandatory order requiring that the Minister undertake a consultation process regarding the foregoing amendment be refused;

(iii) *certiorari* be refused insofar as concerns core ground 10 sub-issue F;

(iv) in principle the question proposed by the applicants in relation to core ground 10 sub-issue E be referred to the CJEU on the primary basis of being relevant to declaratory relief;

(v) the claim for *certiorari* be adjourned generally with liberty to re-enter insofar as concerns core ground 10 sub-issue E;

(vi) the parties be directed to submit simultaneous (rather than sequential) written submissions on the reference (separate from the written submissions on the stay) in line with *Eco Advocacy CLG v. An Bord Pleanála* within 7 days, and the court will finalise the reference thereafter on the basis of the papers;

(vii) the matter be listed for mention on Monday 17th July, 2023, to confirm the directions set out in this judgment and for the parties to indicate at least provisionally whether it is likely that there will be any further procedural issues or any further matters to be addressed in written submissions;

(viii) the parties have liberty to simultaneously file any affidavit regarding the stay as set out in the judgment, to be delivered by 09:30 on Tuesday 18th July, 2023;

(ix) the parties have liberty to simultaneously file any replying affidavit regarding the stay as set out in the judgment, to be delivered by 09:30 on Thursday 20th July, 2023;

(x) the parties be directed to deliver simultaneous written legal submissions on the stay by 09:30 on Monday 24th July, 2023;

(xi) the written legal submissions on the stay should cover the following issues, preferably in the following order, together with any other issues the parties consider appropriate (which additional issues should preferably be notified in advance to the court on the mention date on Monday 17th July, 2023):

(a) possible amendment of relief 2 (substitute "Minister" for "Board");

(b) who carries the burden of proof of risk of environmental damage on discharge of a stay following the establishment of one legal infirmity as well as an inconsistency with guidance in relation to another aspect (or whether the burden of proof is different in relation to risks related to problems that the applicants have demonstrated, as opposed to other risks);

(c) issues related to the merits of the stay other than risk of environmental harm (if there are such issues);

(d) whether the assessment of environmental risk should be made by reference to the material actually before the decision-maker, or matters that the decision-maker was autonomously obliged to consider irrespective of whether they were otherwise put before him, or whether it can be based on current evidence;

(e) whether the assessment of environmental risk should be made by reference to the amended condition 31.13 which I am now directing;

(f) whether the assessment of environmental risk should be made by reference to the question of scientific doubt as regards effects on a European site having regard to best scientific knowledge, or alternatively to any risk to any element of the environment;

(g) whether the assessment of environmental risk should be made by reference only to the three projects that were pending as of the date of grant of the licence, or to any pleaded relevant environmental risk whether a remaining live ground of challenge or not (but potentially one that could be rendered live on appeal), or by reference to any environmental risk whether pleaded or otherwise;

(h) the level of environmental risk depending on the foregoing as a factor in assessing the risk of injustice;

(i) whether the foregoing issues themselves raise any referrable questions of EU law; and

(j) whether the issue of not limiting core ground 10 sub-issue E to declaratory relief should be revisited in the light of the foregoing.

(xii) the next module, step (v) of the decision algorithm, concerning the continuation or otherwise of the stay, be heard on 24th July, 2023 at the conclusion of the List, with a time limit of 90 minutes overall (parties will therefore have to ensure that written legal submissions are as comprehensive as possible, and no word limit will apply); and

(xiii) costs of all modules of the proceedings dealt with to date be adjourned to a date to be fixed.