



EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 29 November 2021  
sj h(2021)8276019

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

**REPLY**

Submitted by the

**EUROPEAN COMMISSION**, represented by C [REDACTED] HERMES and M [REDACTED] NOLL-EHLERS, both members of its Legal Service, acting as agents, with an address for service at the Legal Service, Greffe contentieux, BERL 01/093, 1049 Brussels, and consenting to service by e Curia,

- Applicant

against

**IRELAND**

- Defendant

Seeking a declaration that Ireland has failed to fulfil its obligations under Article 4(4) and Article 6(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7) by failing to designate, as soon as possible and within six years at most, as special areas of conservation (SACs) 217 out of the 423 sites of Community interest (SCIs) in the Atlantic biogeographical region on its territory that had been listed by Commission Decision 2004/813/EC of 7 December 2004, as updated by Commission Decision 2008/23/EC of 12 November 2007 and Commission Decision 2009/96/EC of 12 December 2008; by failing to set site-specific detailed conservation objectives for 140 out of the 423 sites in question; and by failing to establish the necessary conservation measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II of the Directive for any of the 423 sites in question.

## I. FAILURE TO DESIGNATE SACs (ART. 4(4) OF THE DIRECTIVE)

1. Ireland describes that the process of SAC designation under Irish law (the 2011 Regulations) *starts* with the identification of “candidate sites of Community Importance” and their transmission to the Commission. Once the Commission adopts such sites as sites of Community Importance (SCIs), the responsible Minister *completes* this process by designating them as special areas of conservation (SACs) pursuant to Regulation 14 of the 2011 Regulations.<sup>1</sup> According to Ireland, the Minister designates SACs by signing a Statutory Instrument.<sup>2</sup>
2. Ireland does not contest the factual allegation of the Commission<sup>3</sup> that such Statutory Instruments completing SAC designation were lacking for 217 sites by the end of the period laid down in the additional reasoned opinion (9 January 2019) and for 154 sites by the time of filing the application. Ireland merely provides an update informing that, by the time of filing its defence, “[t]here remains 103 sites in respect of which the formal process is not finally complete, and a Statutory Instrument has not yet been signed”.<sup>4</sup>
3. Based on these uncontested facts, the Commission sees confirmation for its claim in the application that Ireland has failed to comply with its obligation to designate sites as SACs under Art. 4(4) of the Directive. The scope of the infringement amounted to 217 sites at the relevant moment in time, which is the end of the period laid down in the additional reasoned opinion (9 January 2019), and has gradually decreased since then.
4. The Commission welcomes Ireland’s intention to complete the SAC designation process in 2022<sup>5</sup>, but notes that this would come up to twelve years after expiry of the legal six-year deadline set in Art. 4(4) of the Directive. With regard to the possible “complexity of the process” under Irish law, for example a need to deal with appeals by landowners,<sup>6</sup> the Commission refers to the established case-law of the Court according to which Member States cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under Union law.<sup>7</sup> Contrary to Ireland’s suggestion, completing the SAC designations for certain sites hosting raised bog is, furthermore, in no way “dependent on agreement being reached with the

---

<sup>1</sup> Defence, paras. 27, 49-51.

<sup>2</sup> Ireland’s reply to the reasoned opinion (Annex A.10), para. 13; defence, paras. 51-52.

<sup>3</sup> Application, paras. 26, 28.

<sup>4</sup> Defence, para. 52 and Annex B.4.

<sup>5</sup> Defence, para. 52.

<sup>6</sup> Defence, paras. 53-56.

<sup>7</sup> Judgment of 12 November 2019, *Commission v Ireland (Derrybrien Wind Farm)*, C-261/18, EU:C:2019:955, paragraph 89 with further references.

*Commission*” on how such sites should be managed.<sup>8</sup> The ongoing discussions on how to manage such sites in line with Art. 6(1) of the Directive in no way prevent Ireland from designating them as SACs pursuant to Art. 4(4) of the Directive.

5. Although Ireland concedes that it has not completed the SAC designation process for many sites, it nevertheless denies a breach of Art. 4(4) of the Directive. Ireland repeats its argument raised in pre-litigation<sup>9</sup> that it would reach compliance with Art. 4(4) of the Directive as soon as it identifies “candidate sites of Community Importance” pursuant to the 2011 Regulations. Ireland argues that sites are, from that moment, clearly defined and enjoy certain legal protection, for example against deterioration or the authorization of projects with a negative impact on the site.<sup>10</sup>
6. In the view of the Commission, such an interpretation of Art. 4(4) of the Directive is not in line with its wording, context or object and purpose.
7. The clear terms of Art. 4(4) of the Directive explicitly oblige Member States to “designate [a site listed as SCI by the Commission] as a special area of conservation”.
8. Taking into account the context of this provision, this obligation is additional to the preceding obligations imposed by the Directive, in particular the obligations to identify sites and propose a list of SCIs to the Commission (Art. 4(1) of the Directive). Ireland’s interpretation effectively denies a distinct obligation to complete this process with the designation of a site as an SAC, which would make Art. 4(4) of the Directive devoid of any purpose.
9. As regards the object and purpose of the provision, the Commission notes that the protection that Ireland grants to “candidate sites of Community Importance”, merely corresponds to Ireland’s obligation under Art. 4(5) of the Directive and the relevant case law of the Court<sup>11</sup> to protect (proposed) SCIs. Such protection does not relieve Ireland from its obligation under Art. 4(4) to designate SCIs as SACs. The Commission would also note that (proposed) SCIs do not enjoy the full range of protection foreseen in Art. 6 of the Directive since the obligation to establish conservation measures under Art. 6(1) of the Directive applies only to SACs. Therefore, designating sites as SACs is also crucial in view of the conservation objective of the Directive.

---

<sup>8</sup> See defence, para. 57.

<sup>9</sup> See e.g. Ireland’s reply to the reasoned opinion (Annex A.10), p. 3

<sup>10</sup> Defence, paras. 29, 35-47, 59.

<sup>11</sup> See judgment of 14 September 2006, C-244/05, *Bund Naturschutz in Bayern*, EU:C:2006:579, para. 47; judgment of 13 January 2005, C-117/03, *Draggagi*, EU:C:2005:16, para. 29.

10. Finally, the Commission also disagrees with Ireland's argument that identifying "candidate sites of Community Importance" under the 2011 Regulations creates the necessary clarity and legal certainty.<sup>12</sup> As Ireland admits, the Minister must, during the process between identification of "candidate sites" and SAC designation, notify affected landowners and the public and may have to modify the list of "candidate sites" following objections, which apparently happens in a significant number of cases.<sup>13</sup> This confirms that identified "candidate sites of Community Importance" pursuant to the 2011 Regulations are by no means final.

## II. FAILURE TO SET CONSERVATION OBJECTIVES (ART. 4(4) OF THE DIRECTIVE)

11. Ireland acknowledges the obligation under Art. 4(4) of the Directive to set site-specific detailed conservation objectives.<sup>14</sup> Ireland accepts that it has not set such conservation objectives for all relevant 423 sites.<sup>15</sup> Ireland does not contest the Commission's allegation that this omission concerned 140 sites by the end of the period laid down in the additional reasoned opinion (9 January 2019) and 71 sites when the Commission filed the application. Instead, Ireland provides an update and informs that it has set conservation objectives for 371 of the 423 sites at the time of filing its defence.<sup>16</sup> Ireland describes its intention of setting conservation objectives for the remaining 52 sites by the end of 2021.<sup>17</sup> Ireland argues that "*in light of the significant progress made*" in setting conservation objectives "*there has been no material breach of Article 4(4) of the Habitats Directive*".<sup>18</sup>
12. The Commission would stress that Ireland does not contest the factual allegation in the application that it had not set site-specific conservation objectives for 140 sites by the end of the period laid down in the additional reasoned opinion. The Commission takes note and welcomes the subsequent progress reported by Ireland. However, the Commission would emphasize that, contrary to Ireland's belief, any such progress does not deny the existence of a breach of Art. 4(4) of the Directive, which has to be

---

<sup>12</sup> Defence, para. 47.

<sup>13</sup> See defence, paras. 16-28, 55, 56.

<sup>14</sup> Defence, para. 62.

<sup>15</sup> Defence, para. 65.

<sup>16</sup> Defence, para. 67 and Annex B.4.

<sup>17</sup> Defence, paras. 67-68.

<sup>18</sup> Defence, para. 70.

determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion.<sup>19</sup>

### III. FAILURE TO ESTABLISH CONSERVATION MEASURES (ART. 6(1) OF THE DIRECTIVE)

13. In its application, the Commission explained in detail why it considers that Ireland has failed to establish the necessary conservation measures for any of the relevant 423 sites. The application with its Annex A.20 specified for each of the 423 sites that there are either no conservation measures (230 sites), incomplete (i.e. not for all habitat types and species) conservation measures (149 sites) or no conservation measures based on site-specific conservation objectives (this applies to the remaining 44 sites and also to most of the 149 sites with incomplete conservation measures). In addition, the application identified a general and persistent, i.e. over-arching, failure to establish conservation measures that are sufficiently precise and detailed and address all significant pressures and threats. For each of these four deficits, the Commission based its allegations on evidence.<sup>20</sup>
14. In its defence, Ireland fails to rebut the Commission's allegations by demonstrating for each of the 423 sites that it has established the necessary conservation measures, i.e. existing conservation measures that are complete, based on conservation objectives and sufficiently precise and detailed to address all significant pressures and threats. Instead, Ireland refers to over-arching programmes and piecemeal samples of sites that do not address each of the 423 sites in question. In the absence of a clear comparison presented by Ireland, the Commission does not see for which of the 423 sites Ireland contests the deficits identified by the Commission. The Commission would emphasize that a site-by-site analysis would have been necessary in view of the Court's finding that conservation measures within the meaning of Article 6(1) of the Directive measures must be established and implemented *within the framework of SACs*.<sup>21</sup>
15. The Commission notes at the outset that Ireland's defence only specifies 137 sites with conservation measures: 134 sites in relation to the ten programmes (Annex B.5) and three additional ones from the list of 79 sites (Annex B.6, with the other 76 sites already included in the 134 aforementioned sites). Ireland, thus, seems to concede that it has

---

<sup>19</sup> Judgment of 5 September 2019, *Commission v Portugal*, C-290/18, EU:C:2019:669, para. 36 and case-law cited.

<sup>20</sup> Application, sections 3.1 to 3.4; Annex A.20, columns 6-9.

<sup>21</sup> Judgment of 17 December 2020, *Commission v Greece*, C-849/19, EU:C:2020:1047, para. 76; judgment of 5 September 2019, *Commission v Portugal*, C-290/18, EU:C:2019:669, para. 52.

failed to establish any conservation measures for the remaining 286 of 423 sites covered by this case.

16. As regards the 137 sites for which Ireland does indicate conservation measures, Ireland considers only 79 to be complete (see the list in Annex B.6, which also includes the six sites addressed in Annex B.7). Ireland seems to concede that the remaining 58 of the 137 sites are incomplete and, therefore, do not comply with Art. 6(1) of the Directive for that reason.
17. For 73 out of the 79 allegedly complete sites, Ireland fails to substantiate their completeness. Ireland presents a comparison relating conservation measures and qualifying features for only six sites (Annex B.7). The extremely cursory information on the conservation measures in the summary sheets for these six sites, however, does not demonstrate that they are sufficiently precise and detailed and address all significant pressures and threats.<sup>22</sup> In view of the Court's statement that Art. 6(1) requires *complete, clear and precise* measures<sup>23</sup>, Ireland has failed to specify who does what, where and when and whether the measures are sufficient to address all key pressures and threats. Furthermore, the Commission notes that site IE0001242 Carrowmagappul Bog SAC is one of the raised bog sites for which restoration plans still only exist in draft form (see below at paragraph 25) and that site IE0000412 Slieve Bloom Mountains cSAC relates to a blanket bog, which is in need of active restoration and for which a restoration plan has not yet been prepared.
18. Therefore, the Commission maintains its claim that Ireland has failed to establish the necessary conservation measures for any of the relevant 423 sites. The Commission sets out in detail in the following paragraphs that Ireland has failed to rebut the allegations in the application with regard to each of the four aforementioned deficits.

### **1. Sites with no conservation measures**

19. In the application, the Commission set out that an examination of the information that Ireland provided in its reply to the letter of formal notice, in particular a document listing 974 measures recorded in and around sites since 1998, shows that there are no conservation measures for 230 sites.<sup>24</sup>

---

<sup>22</sup> See e.g. Annex B.7, p. 294 (“Regime for managing recreational activities”) or p. 295 (“Regime for managing wild herbivores”).

<sup>23</sup> Judgment of 5 September 2019, *Commission v Portugal*, C-290/18, EU:C:2019:669, para. 53 with further references; judgment of 17 December 2020, *Commission v Greece*, C-849/19, EU:C:2020:1047, para. 77.

<sup>24</sup> Application, para. 44.

20. Ireland does not rebut this allegation and does not demonstrate that it has established conservation measures for these 230 sites. Instead, Ireland acknowledges “*the absence of a centralised data management system for the capture of SAC management measures and interventions*” and sees the need “*to develop a data hub which will enable information relating to nature conservation management to be shared and analysed from multiple sources in a single portal*”.<sup>25</sup> This means, in other words, that Ireland does not even seem to know to which extent it has established the necessary conservation measures for individual sites or not. Against this background, it is not surprising that Ireland’s defence mostly refers to over-arching programmes that apply “*on a species or habitats wide basis*”<sup>26</sup> or to piecemeal samples of sites<sup>27</sup> that fail to address all 230 sites identified by the Commission.
21. As stated above, Ireland only specifies 137 sites with conservation measures (134 mentioned in Annex B.5 plus three additional ones featured in Annex B.6). Based on this information, there would be 286 sites without conservation measures.

## **2. Sites with conservation measures for only a subset of habitat types or species**

22. In the application, the Commission set out that a comparison of the standard data forms reported by Ireland (indicating the number of qualifying features, i.e. habitat types and species, of the sites) with Ireland’s indication for how many of these features it had established conservation measures shows that 149 sites have conservation measures for only a subset of the relevant habitat types and species.<sup>28</sup>
23. Ireland does not rebut this allegation by demonstrating for each of these 149 sites that conservation measures are complete in that they cover all qualifying features of the sites.
24. Ireland maintains that “*there are at least 79 sites in respect of which there is a full and complete suite of measures*” and lists these 79 sites in Annex B.6.<sup>29</sup> However, Annex B.6 is a mere list of sites with no comparison that would allow the Commission to assess whether there are conservation measures for each qualifying feature. Even if the Commission were to accept Ireland’s unsupported claim that these 79 sites have complete conservation measures, *quod non*, 344 of the 423 sites covered by this case would still remain without complete conservation measures.

---

<sup>25</sup> Defence, para. 86 and Annex A.20 at column 6.

<sup>26</sup> Defence, para. 73-75.

<sup>27</sup> Defence, paras. 76-80.

<sup>28</sup> Application, para. 49.

<sup>29</sup> Defence, para. 76.



25. Ireland provides a detailed comparison relating qualifying features to measures for only six of the aforementioned 79 sites.<sup>30</sup> Beyond these six sites, Ireland merely states “*that there are other sites in respect of which there are comprehensive and complete conservation measures in place*”, but does not substantiate this assertion apart from a global reference to restoration plans and conservation measures allegedly established for sites hosting the raised bog habitat type and the lesser horseshoe bat species.<sup>31</sup> The text of the defence does not indicate precisely which section of the Annexes would discuss the allegedly “comprehensive and complete” nature of these conservation measures. According to Art. 124(1)(b) of the Rules of Procedure, Ireland must clearly state the pleas in law and arguments upon which the defendant relies. Therefore, the Commission only notes, as a subsidiary argument, that the mentioned restoration plans for sites hosting raised bog for now have only been “drafted”<sup>32</sup> so that one cannot conclude that a complete suite of measures has been established for these sites. Concerning the lesser horseshoe bat species, Ireland mentions 41 sites hosting this species somewhere in Annex B.5<sup>33</sup> (without clear reference in the defence itself) but includes only 23 of these sites in its list of 79 sites (Annex B.6) that allegedly have complete conservation measures. This seems to concede that 18 of these 41 sites may have measures for the lesser horseshoe bat, but not for other qualifying features and, thus, be incomplete.
26. Ireland does not refer, in its defence, to the ten programmes summarized in Annex B.5 in order to specifically rebut the incompleteness of conservation measures. Therefore, any information relating to this issue that may be contained somewhere in Annex B.5 but is not expressly referred to in the defence itself does not satisfy the requirement in Art. 124(1)(b) of the Rules of Procedure to clearly state the pleas in law and arguments upon which the defendant relies. As a subsidiary argument, the Commission notes that only 76 of the 134 sites covered by the ten programmes are included in the list of 79 sites (Annex B.6) with allegedly complete conservation measures. Ireland, thus, seems to concede for the remaining 58 of the 134 sites covered by the ten programmes that they have conservation measures only for a subset of their protected features. Besides, four out of the ten programmes were approved after the end of the period laid down in the additional reasoned opinion (9 January 2019) so that any conservation measures

---

<sup>30</sup> Defence, paras. 77-79, Annex B.7.

<sup>31</sup> Defence, para. 79.

<sup>32</sup> See defence, para. 90.

<sup>33</sup> Defence, Annex B.5, page 286.



envisaged therein fall outside the temporal scope of this case.<sup>34</sup> Furthermore, Ireland explicitly concedes for several of the programmes that the related conservation measures only “partly” cover the qualifying features of the sites.<sup>35</sup>

### **3. Sites with conservation measures that are not based on site-specific conservation objectives**

27. In the application, the Commission described that none of the 44 sites with a complete set of conservation measures (and many of the 149 sites with incomplete conservation measures) have conservation measures that are based on site-specific conservation objectives. The Commission set out its understanding that the legal requirement under Art. 6(1) of the Directive to base conservation measures on site-specific conservation objectives, which the Court confirmed in its judgment in case C-849/19<sup>36</sup>, has a substantive (objectives and measures must correlate) and sequential (objectives must not succeed the measures) component. Therefore, the Commission considered sites to lack conservation measures based on site-specific conservation objectives when either there are no conservation objectives for the sites or conservation objectives are set only after the establishment of conservation measures.<sup>37</sup>
28. Ireland does not contest its obligation to base conservation measures on site-specific conservation objectives. Nor does Ireland refute the Commission’s factual allegation that 37 sites had conservation measures, but no site-specific conservation objectives at all (irrespective of sequencing).<sup>38</sup>
29. Ireland seems to disagree with the Commission’s interpretation that Art. 6(1) of the Directive requires setting site-specific conservation objectives *prior* to the establishment of conservation measures. Ireland considers this an “overly prescriptive approach” and does not see any support for such sequencing in the judgment of the Court in case C-849/19.<sup>39</sup>
30. The Commission already explained why its interpretation is fully in line with the context of Art. 6(1) of the Directive, in particular the fact that early conservation objectives are a prerequisite for compliance with the obligations covered by Art. 4(5) of the Directive.<sup>40</sup>

---

<sup>34</sup> This applies to programme 4 (LIFE Insular), programme 5 (LIFE Lough Carra) and programme 6 (LIFE on Machair), which were all approved in 2021, and to programme 9 (LIFE IP PAF Wild Atlantic Nature), that was approved in 2019 after 9 January 2019.

<sup>35</sup> This applies to programme 4 (LIFE Insular), Annex B.5, p. 273, programme 5 (LIFE Lough Carra), Annex B.5, p. 275, and programme 6 (LIFE on Machair), Annex B.5, p. 277.

<sup>36</sup> Judgment of 17 December 2020, *Commission v Greece*, C-849/19, EU:C:2020:1047, para. 85.

<sup>37</sup> Application, para. 54, 56-58.

<sup>38</sup> See application, Annex A.20 at column 8 (sites marked with “X”, see last row).

<sup>39</sup> Defence, paras. 91-92.

<sup>40</sup> Application, para. 54.

The Commission would add that the correct sequencing of objectives and measures is also necessary in view of the object and purpose of the Directive. Conservation objectives determine the contribution of a site to the Natura 2000 network. They indicate whether species and habitat types have to be maintained or restored and define parameters allowing an assessment of whether conservation measures achieve these objectives. If conservation objectives were only set after the establishment of conservation measures, there would be a significant risk that the objectives cannot serve as a yardstick to assess the appropriateness of the measures but merely mirror otherwise accepted conservation measures. Therefore, it is imperative that Member States, first, set the conservation objectives and, then, develop the necessary conservation measures in view of these objectives.

**4. General and persistent failure to establish conservation measures that are sufficiently precise and detailed and address all significant pressures and threats**

31. The Commission set out how a qualitative assessment of a range of Irish sites with existing conservation measures shows that conservation measures in Irish sites are systematically and persistently of an insufficient quality because they are not sufficiently precise and detailed or fail to address all significant pressures and threats. The Commission illustrated this systemic defect in its additional reasoned opinion with a detailed assessment that focussed on sites protecting two important priority habitat types (coastal lagoons and blanket bogs) and one particularly endangered species (the freshwater pearl mussel).<sup>41</sup>
32. Ireland's defence hardly addresses this claim. Ireland merely denies "any legal flaw" and states that its approach is "now well established".<sup>42</sup> The text of the defence itself, however, does not explain the quality of the conservation measures for any of the three habitat types and species. The Commission discovered that the summaries of certain programmes in Annex B.5 somewhere contain some information on conservation measures for blanket bogs and the freshwater pearl mussel (but not coastal lagoons). But this information is not clearly linked to any argument in the defence itself so that it does not satisfy the requirement in Art. 124(1)(b) of the Rules of Procedure to clearly state the pleas in law and arguments upon which the defendant relies. Therefore, the Commission will address such information only as a subsidiary argument.

---

<sup>41</sup> Application, paras. 62-71; additional reasoned opinion (Annex A.11), p. 17-29 and Annexes II-IV.

<sup>42</sup> Defence, paras. 88-90.

33. As regards coastal lagoons (code 1150), the Commission notes that neither the defence itself nor Annex B.5 demonstrate that Ireland has established sufficient conservation measures for any of the 25 sites hosting this priority habitat type.
34. Concerning the freshwater pearl mussel species (code 1029), the defence itself mentions two programmes (“KerryLIFE” and “Pearl Mussel Project”)<sup>43</sup> that relate to this species, but does not discuss the quality of any specific conservation measures taken for this species. The summaries of these two conservation programmes in Annex B.5 fail to demonstrate that there are conservation measures adequately addressing the key threat of forestry. The absence of conservation measures to address the problems of forestry in the catchment of the Freshwater Pearl Mussel sites is further corroborated by the latest scientific analysis from leading Irish experts on the species and its conservation. While acknowledging that these programmes have been successful in incentivising the restoration of agricultural land through rewetting, the study confirms that this does not have as strong a rehabilitation effect as restoring the deeper peat areas that have been drained for forestry, which has a negative impact on the hydrology of catchments. Therefore, the study criticizes inter alia the aforementioned “KerryLIFE” project for failing to restore areas that have been drained for forestry.<sup>44</sup>
35. As regards blanket bog (code 7130), the defence itself, again, does not discuss the quality of conservation measures. Annex B.5 contains information about programme 9 (LIFE IP PAF Wild Atlantic Nature) on blanket bogs. This project was approved in 2019 after the end of the period laid down in the additional reasoned opinion (9 January 2019). The relevant restoration plans foreseen under this project have not yet been established.

#### IV. CONCLUSION

36. Accordingly, the Commission upholds the form of order sought with its application of 16 July 2021.

C ■■■■■ HERMES

M ■■■■■ NOLL-EHLERS

#### Agents for the Commission

---

<sup>43</sup> Defence, paras. 74-75.

<sup>44</sup> *M. Kuemmerlen, E.A. Moorkens and J.J. Piggott, Assessing remote sensing as a tool to monitor hydrological stress in Irish catchments with Freshwater Pearl Mussel populations, Science of the Total Environment, <https://doi.org/10.1016/j.scitotenv.2021.150807>.*