

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

CASE C-444/21

EUROPEAN COMMISSION

V

IRELAND

REJOINDER

Pursuant to Article 285 of the Treaty on the Functioning of the European Union and Article 126 of the Rules of Procedure of the Court of Justice, Ireland represented by M■■■■ BROWNE, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8 acting as Agent, with an address for service at the Embassy of Ireland, 28 Route d'Arlon, Luxembourg and who consents to service by e-Curia, assisted by E■■■■ Barrington S.C and A■■■■ Carroll B.L. both of the Bar of Ireland, submits the following Rejoinder in response to the Reply of the European Commission dated 29 November 2021.

I. Introduction

1. Ireland files this Rejoinder to the Reply submitted by the European Commission in respect of the application made pursuant to Article 258 TFEU 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 (*the Habitats Directive*).
2. Ireland proposes addressing the principal grounds identified by the Commission in its Reply.

II. Commission's allegations of a failure to comply with the obligations under Article 4(4) of the Habitats Directive in respect of the designation of sites as special areas of conservation

3. In its Defence Ireland outlined the process undertaken in national law for the designation of sites as special areas of conservation. The process which is established in national law ensures that there is compliance with Article 4(4) of the Habitats Directive from the time at which sites are notified as a candidate site of Community Importance/candidate SAC. Compliance with Article 4(4) of the Habitats Directive is not dependent on the final designation by Statutory Instrument.
4. Ireland notes that the Commission Note on the Designation of Special Areas of Conservation (14 May 2012) confirms that the Habitats Directive does not provide a procedure for the designation of SACs and the *'issue is a matter for the domestic law of the Member States, which enjoy a broad discretion in determining the manner in which they designate the SCI as SAC'*. In accordance with that discretion, Ireland has adopted a procedure for the designation of SACs which comprise administrative and statutory acts to give effect to the obligations arising from Article 4(4). That procedure ensures that all required protections are afforded to sites from the point of their notification in domestic law either pursuant to the European Communities (Birds and Natural Habitats) Regulations 2011 as amended (*the 2011 Regulations*) or their precursor the European Communities (Birds and Natural Habitats) Regulations 1997 (*the 1997 Regulations*). Ireland emphasises that the protection in domestic law is *the same* for candidate Sites of Community Importance (i.e. those subject to notification pursuant to either the 1997 Regulations or the 2011 Regulations) as that which is afforded to sites in respect of which a Statutory Instrument has been signed (§34 of the Defence). In particular, the Defence sets out (at §§37 to 38) the extent of the

domestic protections offered to candidate sites (including candidate Special Areas of Conservation). This meets the requirements that the obligations from the Directive be implemented with indisputable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty.

5. The suggestion by the Commission that compliance with Article 4(4) cannot be achieved at the time of the publication of the Notice of Intention to Designate as it is possible for the precise parameters of the site boundaries to be altered in the course of the national law process is not supported by authority. The Commission separately acknowledges, in the Guidance published by the Expert Group on the Birds and Habitats Directive entitled *Natura 2000: De-designation of sites or part of sites – conditions and justifications* that site boundaries can be altered following designation due to scientific errors identified after the fact. While this is not a direct analogy, it is appropriate to have regard to this factor as the appeals procedures established by the 2011 Regulations are in place to allow the identification of such scientific errors. The only basis upon which the boundaries of a site may change between the publication of the Notification of Intention to Designate, and the enactment of the Statutory Instrument is where a genuine scientific error is identified. The national law processes are therefore consistent with the position adopted by the Commission and the existence of an appeal does not invalidate the earlier designation of the site nor does it suggest that there is an absence of compliance with Article 4(4).
6. Contrary to the plea by the Commission, the procedure adopted by Ireland does not render Article 4(4) devoid of any purpose. Consistent with the obligations arising from Article 4(4) and in line with the precautionary principle, the process adopted by Ireland gives sites all the protections required by the Directive at the commencement of the national law procedure thus complying with the obligation to designate sites. Ireland emphasises, again, that the publication of the Notice of Intention to Designate includes the identification of the particulars and the extent of the site, the qualifying interests and the notifiable actions. From the point of the publication of the Notification of Intention to Designate, there is, as a matter of national law, an obligation to apply the precautionary principle and undertake assessments for the purpose of Article 6(3) of the Directive thus ensuring the protection of the relevant sites. This meets the obligations arising from Article 4(4) of the Directive. The completion of the process as a matter of national law falls within the discretion afforded to Member States as to the manner in which designation is achieved.

7. It is also not the case that the notification of a site as a candidate Site of Community Importance corresponds to the obligations under Article 4(5) of the Habitats Directive. The publication of the Notice of Intention to Designate goes further and includes the particulars and the extent of the site, the qualifying interests and a list of activities in respect of which the consent of the Minister is required before they can be undertaken. This goes beyond what is required by Article 4(5) of the Directive.
8. Ireland does not suggest that it has been relieved of its obligations under Article 4(4) of the Directive. The national law procedures adopted by Ireland ensure that relevant sites are identified and notified to the public as candidate Special Areas of Conservation with sufficient clarity and legal certainty, at which point they benefit from all the required protections of the Habitats Directive.
9. Notwithstanding and without prejudice to the foregoing, at the time of filing this Rejoinder, Ireland has completed the process and enacted into law a Statutory Instrument in respect of 339 of the 423 sites. Statutory Instruments will be signed and enacted into law in relation to the remaining sites in the course of 2022. It was noted at §52 of Ireland's Defence that it was intended to enact Statutory Instruments in respect of 36 sites by the end of 2021. At the time of filing this Rejoinder, Statutory Instruments in respect of 19 of those 36 sites have been enacted. Unfortunately, a delay arose in relation to the remaining sites following the implementation of new IT systems. Ireland continues to progress the enactment of the remaining Statutory Instruments and it is intended to complete that process in respect of all 423 sites by end of 2022.

III. Commissions' allegations of a failure to comply with the obligations under Article 4(4) of the Habitats Directive in respect of the setting of conservation objectives for special areas of conservation

10. At the time of filing this Rejoinder, Ireland has identified and published site-specific conservation objectives for all 423 sites which are the subject matter of this application.

IV. Commission's allegations of a failure to comply with the obligations under Article 6(1) of the Habitats Directive in respect of the establishment of necessary conservation measures for special areas of conservation

11. The Reply of the Commission in respect of the allegation that there has been a failure to comply with Article 6(1) of the Habitats Directive is marked by a reluctance to acknowledge the measures which have been implemented across the sites which form the subject of this application and the imposition of a standard for the achievement of those measures which does not have support in the text of the Directive or the case law of this Court. In particular, Ireland submits that the position adopted by the Commission suggests that compliance with the obligations arising from Article 6(1) can only be achieved where it is demonstrated that conservation measures have been implemented at all sites and that those measures are operating without error. Ireland submits that the standard advocated by the Commission is one which is unattainable and which fails to acknowledge the on-going nature of conservation measures in a real-world environment.

12. Ireland consistently keeps the conservation measures which are being implemented across the Natura network, under review so as to ensure that threats and pressures which have been identified in respect of individual sites are addressed. The fact that work of this nature is on-going and that there may be the need for adjustment in some areas does not negate or diminish the measures which are, in fact, in place or their effectiveness. Further, the need for development and adjustment, or the identification of further or different measures does not, contrary to what is suggested by the Commission, support arguments that there has been a failure to comply with the obligations arising from Article 6(1) or that Ireland has no conservation measures in place at the 423 relevant sites. Ireland submits that its approach is supported by the monitoring and reporting requirements of Article 11 and Article 17 of the Habitats Directive, which envisage that conservation measures are evaluated and, where necessary, their implementation adjusted to ensure their effectiveness.

13. Ireland notes that while the Commission looks to dismiss the information which has been provided by Ireland in respect of the conservation measures which have been implemented, it does not dispute the material provided in respect of the 79 sites in respect of which a full suite of conservation measures have been implemented. Ireland submits that this demonstrates compliance in respect of those sites. Further the dismissal of certain measures which have been implemented by Ireland, for example the production of formal restoration and conservation plans for certain sites, on the basis that the work is not yet complete is counterproductive and unreasonable as it fails to acknowledge the significant progress which has been made and the work which has been undertaken to date.

14. At IV of its Defence, Ireland outlined the conservation measures established in respect of the SACs which are the subject matter of this application. Specifically, Ireland described the ten programmes which are being implemented across different SACs which comprised detailed and comprehensive conservation measures which apply on a site-specific basis. A summary of those programmes was included at Annex B.5.
15. Ireland also provided a list of 79 sites in respect of which a full and complete suite of measures have been identified and implemented (Annex B.6) and provided information in respect of six sample sites which demonstrated that there are full and complete site-specific conservation measures which have been identified and implemented in line with the published site-specific conservation objectives and which address all of the qualifying interests present on those sites (Annex B. 7). Contrary to what is suggested at §24 of the Reply, Ireland has demonstrated that these 79 sites have full conservation measures in place. Ireland has now prepared further information in respect of the six sample sites identified at Annex B.7. This information provides further detail for each of the six sites and illustrates the measures implemented in line with the site specific conservation objectives (Annex B.8). Further, Ireland has prepared a document which demonstrates the full and complete suite of measures which are in place in respect of a further 21 sites which were originally identified in Annex B.6. These 21 sites are sites in respect of which the lesser horseshoe bat is a qualifying interest (Annex B.9). Work continues to ensure that a comprehensive package of conservation measures are implemented at all remaining sites to supplement the conservation measures which are currently in place.
16. In addition, at §81 – 84 of its Defence Ireland explained that both the 1997 Regulations and the 2011 Regulations provide for the identification of Notifiable Actions and Activities Requiring Consent in respect of every site which is identified as a European Site (i.e., including a candidate special area of conservation and a special area of conservation). Both Notifiable Actions and Activities Requiring Consent, which are in place in respect of every site which are the subject matter of this application, are site specific conservation measures which operate to prevent damage from occurring to any European Site in accordance with the obligations arising under the Habitats Directive.
17. Regrettably, the Commission do not appear to have understood the contents of Ireland's Defence and erroneously consider that there are 230 sites in respect of which

there are *no* site-specific conservation measures. This is not correct. There are no sites within the 423 sites which are the subject matter of this application in respect of which there are no site-specific conservation measures. Every site which is the subject of this application has either a list of Activities Requiring Consent or a list of Notifiable Actions, which identifies activities in respect of which the consent of the Minister is required before they can be undertaken at that site.

18. In order to avoid further confusion, it is necessary to reiterate the existence of Notifiable Actions and Activities Requiring Consent and the manner in which they operate as site specific conservation measures. Activities Requiring Consent are activities which the Minister has reason to believe may, either individually or in combination with other activities, plans or projects, (a) have a significant effect on a European Site, (b) have an adverse effect on the integrity of a European Site, or (c) cause the deterioration of natural habitats or the habitats of species or the disturbance of the species for which the European Site may be or has been designated pursuant to the Habitats Directive or has been classified pursuant to the Birds Directive, in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive.
19. As well as the activities covered by Activities Requiring Consent and Notifiable Actions, Regulations 28(1) and 29 of the 2011 Regulations further grant the Minister the power to direct that any other activity not previously identified shall not be carried out, caused or permitted to be carried out or continued to be carried out by any person in a European Site, or part thereof or at any other specified land except with, and in accordance with the consent of the Minister. All of these statutory protections have been enacted in law and in force for all of these sites at least since 2011 and, in some instances since 1997.
20. A Notification of Intention to Designate published pursuant to Regulation 12 of the 2011 Regulations includes a requirement to include in that notification a list of activities that require the consent of the Minister, which have been identified in respect of an individual site, known as a Notifiable Action. Further, the Statutory Instrument published at the conclusion of the national law designation process includes a list of the Activities Requiring Consent in respect of that European Site. An equivalent procedure existed under the earlier 1997 Regulations (see Regulation 14 of the 1997 Regulations).
21. Activities Requiring Consent and Notifiable Actions are tailored to the qualifying interests of an individual European Site and are designed to protect that specific site

by requiring the consent of the Minister to be obtained for an activity which could impact the site. There are a total of 38 Activities Requiring Consent and 30 categories of Notifiable Actions, a subset of each which will apply in respect of each individual European Site.

22. Where a Direction has been made by the Minister pursuant to Regulation 28(1), it is a criminal offence to contravene such Direction.
23. Every candidate Special Area of Conservation and Special Area of Conservation in Ireland has had Activities Requiring Consent and Notifiable Actions identified in respect of those sites. Each of the 423 sites which fall within the scope of this application has a list of Activities Requiring Consent or Notifiable Actions which are in operation in respect of that site. Ireland has prepared a list of each of the 423 sites which shows the Activities Requiring Consent and Notifiable Actions which exist in respect of each of those sites (Annex B.10 and Annex B.11). This site-by-site list of Notifiable Actions at Annex B.11 must be read in conjunction with the information in Annex B.12, in which the Notifiable Actions referred to by number in the larger list are identified and presented.
24. It is therefore not correct to suggest that there are 230 sites (or any sites) in respect of which no site-specific conservation measures have been implemented.
25. The Commission is further dismissive of the conservation programmes which have been implemented by Ireland across the Natura network on the basis that this work on the conservation of species and habitats has not to date always been explicitly linked to specific geographical site boundaries. Ireland submits that the Commission has taken an overly narrow perspective on this issue. Nature conservation work cannot simply be confined to specific geographical site boundaries. The nature and coordination of the work is such that it can cross geographical boundaries and have an overarching impact on the protection of species and habitats. The implementation of programmes of this nature are interlinked across sites and a broader view ought to be taken of nature conservation measures instead of having a narrow focus on individual measures in isolation to the remainder of a programme. The implementation of programmes of the type identified by Ireland has a positive effect on individual sites and the overall Natura network and reflects the reality that nature conservation can be complicated with a need for interlinked actions to achieve the best outcomes.

26. The points made by the Commission at §§27 – 31 of the Reply have been addressed in Ireland's Defence. In short, the Commission suggests that a breach of Article 6(1) arises where site specific conservation objectives have not been set *prior* to the establishment and implementation of conservation measures. For the reasons already outlined in its Defence, Ireland submits that this is a proposition which does not find support in either the language of Article 6(1) or the case law of the Court. As already identified in the Defence, in Case C-849/19 the Court addressed a different factual scenario to that which arises in this case and it does not follow from that decision that a breach of Article 6(1) arises where the implementation of site-specific conservation measures preceded the establishment of site specific conservation measures, where both those requirements are now in place. Ireland notes that no additional case-law is relied upon by the Commission in support of its interpretation of Article 6(1) and its view of the requisite sequencing.
27. The approach favoured by the Commission would result in conservation measures implemented by Member States being entirely discounted for the purposes of the Directive simply because they pre-date the publication of site-specific conservation objectives. That cannot be consistent with the underlying purpose of the Directive to ensure that nominated sites are protected and that there is a high level of environmental protection throughout the Union.
28. At §28 the Commission asserts that Ireland does not refute the factual allegation that 37 sites had conservation measures but no site-specific conservation objectives at all. That is not correct. The measures in place at those sites are all based on a tailored assessment of threats and pressures at the sites, notwithstanding that the final, detailed Site-Specific Conservation Objectives for the site had not yet been developed and published. Furthermore and as explained above, from the point of the publication of the Notice of Intention to Designate, all European Sites have Activities Requiring Consent/Notifiable Actions, which are tailored to the requirements of the site. General objectives for the 37 sites in question were therefore in place long before the preparation of the detailed Site Specific Conservation Objectives for publication
29. At §31 – 34 of the Reply the Commission addresses the qualitative assessment of conservation measures which have been implemented at certain sites by Ireland. Ireland continues to look to improve the quality of the conservation measures which are implemented in the State. Ireland submits that the work done by it in recent years to accelerate the final designation of special areas of conservation in national law, to set site specific conservation objectives and to implement and improve conservation

measures which are in place, demonstrates the importance placed by Ireland on ensuring that there is compliance with the obligations arising from the Habitats Directive. It is not correct to say that the measures in place are not of sufficient quality because they may not address *all* of the threats to and pressures on a Site at any given point in time.

30. As already indicated in the Defence, Ireland is working to ensure that it continues to adhere to its obligations under the Habitats Directive and to ensure that all conservation measures are implemented in a manner which achieves the aims of the Directive. Ireland considers that such work is dynamic in nature and will invariably require ongoing assessment and development. In essence, Ireland considers that the standards contended for by the Commission are not capable of being attained. No site is static in nature. Further work will always be required.

V. Conclusion

31. Ireland maintains the position outlined in its Defence.

32. Accordingly, Ireland submits that the form of order to be made should be that which is identified at VIII of its Defence.

Dated: 20 January 2022

SIGNED:

M [REDACTED] LANE, Solicitor

On behalf of: M [REDACTED] BROWNE

Chief State Solicitor, Agent for Ireland

A [REDACTED] JOYCE, Solicitor

On behalf of: M [REDACTED] BROWNE

Chief State Solicitor, Agent for Ireland

SCHEDULE OF ANNEXES TO THE REJOINER IN CASE C-444/21

No	Annex	No of pages	Reference in the Rejoinder
B.8	Further information in respect of the sites addressed in Annex B.7	13	Paragraph 15
B.9	Suite of conservation measures in place in respect of 21 sites where the qualifying interest in the Lesser Horseshoe Bat	21	Paragraph 15
B.10	Sites in respect of which there are Activities Requiring Consent and the specific Activities Requiring Consent in place in respect of each individual site	133	Paragraph 23
B.11	Sites in respect of which there are Notifiable Actions and the specific Notifiable Actions in place in respect of each individual site	6	Paragraphs 23
B.12	List of Notifiable Actions	60	Paragraph 23