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Project Woodland

Environmental Law Reference Report

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Alice Whittaker
Philip Lee LLP

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1. Introduction

1.1 Regulatory Review Report

This document is intended to complement the Regulatory Review Report published on 29 June 2022.

The Regulatory Review Report was prepared in response to the Terms of Reference for the Regulatory Review and makes several recommendations in that respect. Environmental Law, much of which derives from decisions of the Court of Justice of the EU (CJEU) and the Irish High Court, Court of Appeal, and Supreme Court, is complicated. It is also in a state of flux, and there are aspects which remain uncertain. To provide a full analysis of the reasoning behind the recommendations, it is considered necessary to also make available this Reference Report which contains an in-depth discussion of the legal issues underpinning the recommendations in the Regulatory Review Report.

1.2 No reliance

This Environmental Law Reference Report is a lengthy document which is intended to be dynamic and may be up-dated from time-to-time. It may, therefore, contain material which requires revision, up-dating, or correction. This Environmental Law Reference Report is not a legal opinion, it does not purport to provide legal advice, and should not be relied upon by any person as legal advice.

1.3 Overview of the Environmental Law Reference Report

This Environmental Law Reference Report focuses on certain EU Directives and their implementation in Ireland and other Member States, which define the parameters within which a regulatory framework for forestry must fit.

For example, the Water Framework Directive, Habitats and Birds Directives, and the EIA Directive, leave no room for doubt that a regulatory / consent system is required for forestry. The jurisprudence from the CJEU indicates that Member States are required to have a regulatory system which ensures that proposed plans, projects, and activities are checked, before they are permitted to proceed, to ensure that the objectives of these Directives are met.

It does not matter how beneficial a plan, project, or activity may be from a policy or climate perspective; under the Water Framework Directive, Habitats, and Birds Directives, if the project or activity would cause deterioration to water status, or if it would result in adverse impacts on the integrity of a European site (SPA or SAC), the project or activity must be refused.

There is, accordingly, particular focus in this Reference Report on the EU Directives which prescribe the circumstances in which approval may be granted.

1.4 Water Framework Directive – Chapter 2

The Water Framework Directive[1] contains two key Member State obligations: the obligation to prevent deterioration, and the obligation to enhance the status of water bodies.

The obligation to prevent deterioration of the status of a water body applies to surface waters (Article 4(1)(a)(i)) and groundwater (Article 4(1)(b)(i))[2]. Even a temporary deterioration in the status of water body may only be authorised in exceptional circumstances and pursuant to a derogation under Article 4(7) and subject to strict cumulative conditions[3].

Forestry has been identified as a significant pressure on 'at risk' water bodies.

DAFM, as a competent authority under the Forestry Act, is obliged to refuse to authorise any project (or measure) liable to result in deterioration of the status of a water body. This entails an **obligation to check** whether the proposed project could cause deterioration of the existing status of a water body or jeopardise the attainment of 'good' status which, according to the High Court in *Sweetman (Bradán Beo)*[4], can only be done when the EPA has previously classified the water body concerned. In this context, the High Court has referred questions to the CJEU, asking[5]:

- Are Member States required to characterise and classify *all water bodies,* irrespective of size? The EPA's position is that ecologically insignificant water bodies may be left unclassified.
- Is the obligation different for water bodies in a protected area?
- If classification is needed for all water bodies, can the competent authority consent to a project that may affect the water body prior to it being categorised and classified?
- If classification is not required for all water bodies, can the competent authority consent to a development which is liable to affect the unclassified water body.

The CJEU's ruling on the referral is awaited.

1.5 Habitats Directive – Chapter 3

The Habitats Directive[6] sets out obligations which are *binding as to their effect*. The Directive has two main sets of provisions:

- Articles 3 – 11 relate to the conservation of natural habitats and the habitats of species (SACs), and by virtue of Article 7, also the habitats of wild birds (SPAs).

- Articles 12 – 16 relate to the protection of the animal species listed in Annex IV (a) and the plant species listed in Annex IV (b). (Separately, the Birds Directive relates to the protection of wild birds).

Article 6(3) establishes an Appropriate Assessment (AA) procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of a 'European site', but likely to have a significant effect on it, is authorised only to the extent that it will not adversely affect the integrity of that site[7]. The AA procedure is addressed in Chapter 6 (AA Screening) and Chapter 7 (AA).

Any adverse effect on a European site must be prevented, irrespective of the benefits of the proposed project. There is limited scope for derogation under Article 6(4), only where there are no alternatives, and where the specific project is established to be necessary for imperative reasons of overriding public interest.

1.6 Habitats Directive – Strict Protection Regime – Chapter 4

Under Article 12 of the Habitats Directive, Annex IV (a) species must be strictly protected, wherever they occur in the wild. Annex IV (a) species include otter and several species of bat. Article 12 protection is not limited by European site boundaries.

Legislation alone is not sufficient to establish a system of strict protection. Strict protection measures must be *effective* in preventing harm. A strict protection regime should enable the competent authority to *anticipate activities which could be harmful* to the species protected by the Habitats Directive. Any derogation under Article 16 must be strictly construed and will apply only in exceptional circumstances.

The strict protection regime is transposed by the EC (Birds and Natural Habitats) Regulations. Ultimately the responsibility for compliance with Regulations 51 and 54 lies with the person

proposing to carry out the licensed activity, and this includes an obligation to secure a derogation licence from the Minister for Heritage where required. This is a separate, parallel procedure to the Forestry Act.

In *Hellfire Massy Residents Association* the CJEU is asked to determine whether a similar separate, parallel procedure constitutes a 'strict protection regime' in accordance with Article 12. The CJEU is also asked to consider whether the derogation licence procedure should be subject to public participation.

1.7 Birds Directive – General Protection Regime – Chapter 5

The Birds Directive requires Member States to achieve the protection of all wild birds, not just those for which European sites are designated, or those that are endangered.

Article 4 covers Annex I birds for which SPAs are designated, and their protection extends beyond the boundary of the SPA to include ex situ habitats within their natural range. Article 5 covers all wild birds and requires Member States to put in place concrete and effective measures for their conservation and protection wherever they occur. These provisions are highlighted in the Regulatory Review Report as a key reason why a prior consent procedure for the purposes of checking ex situ impacts is necessary.

There is some tension between the rulings of the CJEU in Case C-441/17 and Cases C-473/19 and C-474/19, and the provisions of the Wildlife Acts, in relation to harms which may occur to birds during the ordinary course of agriculture, forestry, and land development activities. The prohibitions under the Wildlife Acts are limited to specific periods within the life of the species, whereas the Birds Directive as interpreted by the CJEU is more far-reaching.

Section 9(5) of the Wildlife Acts provides that: *nothing may be done by licence or permit that would not be allowed to be done under the EC (Birds and Natural Habitats) Regulations 2011 (SI 477/2011) or the Birds or Habitats Directives.* This provision is designed to avoid a challenge on grounds of incompatibility of the domestic legislation with EU law, however it creates significant legal uncertainty, and suggests that when applying the Wildlife Acts, it is necessary to interpret the Acts in a manner that is consistent with the CJEU's rulings on the Birds and Habitats Directives.

1.8 Habitats Directive – AA Screening – Chapter 6

There must be a system of authorisation which guarantees that projects likely to have a significant effect on a European site do not proceed without an Appropriate Assessment under Article 6(3) of the Habitats Directive. AA is required where a plan, project or activity is *likely to have a significant effect* on a European site / Natura 2000 site. Consequently, AA screening is concerned with <u>likely significant effects</u>.

The Minister may not grant a licence under the Forestry Act 2014 without an AA Screening unless the Minister is certain that likely significant effects on a European site can be ruled out, based on objective scientific information.

New AA Screening procedures in 2019 in response to Case C-323/17 People over Wind directed DAFM Inspectors to treat the following as 'mitigation' to be disregarded in AA Screening:

(i) compliance with the Environmental guidelines, requirements, and standards, and
(ii) any specific safeguards detailed in the application itself.

The EC Methodological Guidance on Article 6(3) and (4) of the Habitats Directive provides that, notwithstanding Case C-323/17, a generic component of a project can be considered in the AA Screening. The Guidance gives the example of Best Available Technologies, statutory 'no go' zones,

and pre-emptive measures prescribed in Regulations, Natura 2000 management plans and/or spatial / zoning plans, as generic mandatory components.

For example, the Minister, in determining any application under the Forestry Act 2014, is obliged to follow good forest practice, and to have regard to the social, economic, and environmental functions of forestry, which would include any functions forestry serves under the RBMP programme of measures. The RBMP sets out measures to avoid or minimise uncontrolled discharges to waters, including measures specifically related to forestry. In addition to the RBMP measures:

- The Minister may not grant approval for a project unless he is satisfied that the necessary measures are in place to prevent deterioration of a water body - Case C-461/13 *Weser*

- SI 113/2022 prescribes mandatory measures to avoid or reduce the potential for discharges of nitrates to surface waters from certain agricultural activities.

- SI 291/2013 requires 'preventative measures' to be taken to prevent materials/equipment/machinery/vehicles falling into excavations or water.

In AA Screening, according to the EC Guidance, it should be permissible to take account of measures which are:

- *prescribed* by regulations, spatial or zoning plans, Natura 2000 management plans, or best available technologies (BAT),

- not plan- or project- specific, but generic,

- identified and described as such in the project description.

Recommendations 1 and 2 in the Regulatory Review Report take account of the reasoning of the CJEU in Case C-323/17, and the European Commission in the EC Methodological Guidance, and provides that generic mandatory water setbacks should assessed (AA/SEA), subject to effective public consultation, and their effectiveness in certain site conditions should be determined prior to adoption in binding regulations or statutory guidelines. Such setbacks (or 'no go' zones) would be binding and enforceable against all licensees unless the licence expressly provides otherwise.

The difficulties identified by the CJEU in Case C-323/17 would therefore be overcome as follows:

- the AA Screening would allow for a full and precise analysis of the protective measures capable of avoiding or reducing any significant effects under certain assumed conditions;

- DAFM would not be relying on the protective measures without a full and precise analysis of their capability or effectiveness, and would not therefore deprive the Habitats Directive of its purpose or could circumvent its essential safeguarding role;

- DAFM would not be relying on the protective measures without a full and precise analysis of their capability or effectiveness. The AA of the generic mandatory measures would be a full and precise analysis of their effectiveness in certain assumed conditions. The AA Screening of the proposed project would consider whether there are any site-specific reasons why the AA conclusions could not be relied upon to screen out likely significant effects on a European site. This approach would not result in *lacunae* or gaps and would result in complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned.

- There would be no absence of an AA, and there would be a proper assessment of the impact and effectiveness of those measures in protecting the European site.

- Members of the public would not be deprived of their right to participate in the environmental decision-making procedure, as they would be consulted prior to the adoption of the generic mandatory measures, and they would be consulted on the individual licence application on a project-specific basis.

The Minister cannot remove all reasonable scientific doubt as to the effects of proposed works on a specific European site without a site-specific AA Screening. However, when carrying out site-specific AA Screening, this approach would permit the Minister to take account of the generic mandatory measures that have already been the subject of a prior AA and public participation, and their effectiveness in certain conditions will have been ascertained before the individual licence application is made.

The EC Methodological Guidance refers to 'no go' zones as an appropriate type of measure to treat in this manner. For that reason, Recommendations 1-2 in the Regulatory Review Report focus on water setbacks.

1.9 Habitats Directive – Appropriate Assessment – Chapter 7

Article 6(3) requires a competent authority, such as the Minister when licensing forestry applications, to be certain beyond any reasonable scientific doubt, that the proposed project will not adversely affect the integrity of a European site.

This means that the Minister must be certain that the habitats and species for which the site is designated will not be harmed by the proposed project. Such harm could potentially occur within the boundary of a European site, or ex situ.

The AA should assess all aspects of the proposed project, including all proposed mitigation or protection measures to avoid or reduce adverse impacts. The effectiveness of the protective measures must be certain at the time the decision is made that the project can proceed.

A project cannot be authorised based on assumptions that measures to avoid or reduce an adverse impact will be effective. This must be established at the outset. Reliance on potential future benefits, such as replacement habitat/ habitat enhancement, can only occur where such benefits are certain to occur.

The 'Dutch Nitrates' case considered an adaptive management approach to AA and rejected it as insufficiently certain. An adaptive management approach involves the approval of incremental projects, with continuous monitoring, assessment, and adjustment, to minimise the risk of harm. The CJEU held that such an approach to AA lacks the requisite certainty to guarantee no adverse impacts on site integrity.

1.10 Environmental Impact Assessment Directive – Chapter 8

The EIA Directive only applies to project types listed in either Annex I or Annex II of the Directive. The list of project types, which was drawn up by the Member States in 1985, has not changed significantly in almost 40 years. That list includes: restructuring of rural landholdings (Class 1(a)); the use of uncultivated or semi-natural areas for intensive agriculture (Class 1(b)); water management, irrigation and land drainage linked to agriculture (Class 1(c)); initial afforestation (Class 1(d)); deforestation for the purposes of converting to another land use (Class 1(d)); construction of roads (Class 10(e)); and any change or extension to one of these project types, where the change or extension is likely to have significant effects on the environment (Class 13(a)).

If an afforestation licence application and a forest road application will be subject to a requirement for EIA screening. They also require a development consent process, such as a licence or other type of authorisation. A felling licence application could also be subject to EIA screening if it involves land drainage or other works potentially coming within the scope of one of the other project types. Felling for the purposes of deforestation is subject to EIA.

EIA screening must be carried out in accordance with the criteria specified in Annex III of the EIA Directive. The Directive envisages that the applicant seeking permission will provide the information specified in Annex IIA, to inform the EIA screening process.

Where the afforestation is of a landholding of 50 hectares or more, EIA will be mandatory. Below 50 hectares, EIA screening is mandatory unless the project is truly *de minimis* such that it could have no appreciable effect on the environment. As the competent authority, the Minister is required to make an EIA screening determination that the proposed project is / is not likely to have significant effects on the environment.

Significant effects may be both positive and negative[8]. Significant effects may arise from below-threshold projects, particularly when considered in combination with other projects. A project proponent may propose and incorporate mitigation measures in a project proposal which may be considered in carrying out EIA screening to determine whether, with mitigation, the effects of the project are likely to be significant. As Holland J highlighted in *Monkstown Road Residents' Association*, when carrying out EIA screening it is important not to confuse the acceptability of effects with the significance of effects. An effect may be both significant (and therefore require EIA) and acceptable, and the acceptability of an effect in the opinion of the competent authority renders it no less significant from an EIA screening perspective.

When assessing an application for an initial afforestation licence, it is necessary to define the whole project for that purpose. To that end, it is necessary to define all works and activities in respect of which there is a causal connection with the initial afforestation which is *demonstrably strong and unbreakable* that they should form part of the EIA procedure. An integrated single licence application approach to the entire life cycle of a forestry project would impose the EIA procedure to all of the project elements with a clear and unbreakable connection between them. The EIA procedure would apply to the whole project, and the AA procedure would equally apply to the whole project. This approach to the regulation of forestry would present *at least* the following difficulties:

- A whole life-cycle forestry project such as this would be virtually impossible to 'screen out' for the purposes of EIA. Each such application would require an EIAR and considerable supporting technical detail would need to be worked out in advance, to enable the EIA to be carried out in accordance with the requirements of the EIA Directive.

- Over time, any significant change or extension to the project as previously authorised would require a further EIA and development consent procedure before it could be permitted to proceed, which would somewhat defeat the purpose of having a single integrated authorisation at the outset.

- The AA procedure would apply to the whole project, with the result that the competent authority would need to be certain at the time the licence is granted, beyond all reasonable scientific doubt, that the proposed forestry project would not have adverse effects on any European site, despite that some aspects of the project would not be undertaken for well over ten years after the initial licence is granted.

The EIA Directive does not require a single development consent application once the objectives of the EIA Directive are not circumvented by the granting of separate consents for different aspects of an overall project.

In several EU Member States, however, an initial afforestation licence application is approved, and part of that approval includes the proposed forest management plan setting out how the forest will be managed in accordance with sustainability rules over the life of the plan, which is typically 5 years but in some cases 10 years. In Case C-661/20 *Commission v Slovak Republic*[9], legislation which exempted forest management plans and modifications to FMPs from the obligation to carry out AA was inconsistent with the Habitats and Birds Directives, where those plans were likely to have a significant effect on a European site. In Joined Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen*[10] the proposed thinning of two areas of forest (not within an European site) came within the parameters of the approved FMP and was therefore subject to a notification procedure to the relevant Forestry Agency. The authorisation of activities pursuant to a FMP must be capable of anticipating the potential for harmful effects on species protected by the Habitats and Birds Directives, wherever they occur, and must involve binding, specific conditions and rules, enforceable with penalties, and subject to monitoring and supervision, to ensure that the approach meets the requirements of a system of strict protection for such habitats and species. The FMP approach to authorising recurring activities such as thinning and active forest management therefore requires a level of ongoing resources for the appropriate levels of supervision, monitoring and enforcement to ensure the strict protection of European sites and species.

1.11 Strategic Environmental Assessment Directive – Chapter 9

The SEA Directive is concerned with ensuring that environmental considerations are integrated into public plans and programmes prior to their adoption in specific sectors including forestry.

The SEA Directive applies to plans or programmes relating to the forestry sector, where the term 'plans or programmes' should be interpreted broadly and may apply to regulations and designations of land for particular purposes, if the measure defines rules and procedures for later scrutiny, for example spatial or other criteria which may be relied upon in determining suitable locations for forestry. The precise scope of the SEA Directive and the obligation to assess alternatives is the subject of a pending Supreme Court appeal[11].

Where the Regulatory Review Report recommends the adoption of statutory instruments, or statutory guidance, setting out rules and standards and criteria for the purposes of streamlining forestry planning and decisions, it is assumed that SEA requirements will apply.

1.12 Assessment and Protection of Landscape – Chapter 10

Forestry has the potential to have significant environmental effects on the landscape. Effects can be both positive and negative. The National Landscape Strategy outlines certain actions to be taken for the purposes of conserving and maintaining landscapes and their positive contribution to the environment. It seems, however, that not all the specified actions have been completed. The European Landscape Convention, to which Ireland is a party, incorporates guidelines for the preparation of Landscape Character Assessments. It appears that there is no national landscape character assessment in Ireland.

Landscape is a feature of the environment which is likely to be vulnerable to the cumulative effects of multiple forestry projects, even where no individual project is likely to have a significant environmental effect on its own. Landscape is a key consideration under the Planning Acts, the Forestry Acts, and also in the context of SEA and EIA.

1.13 Public Participation in the Aarhus Convention – Chapter 11

The Aarhus Convention confers public participation rights to the public in relation to environmental decision-making involving SEA, EIA and AA. Opportunities to participate must occur early in a decision-making process, at a time when participation can be effective in influencing the process.

To be effective, public participation procedures must ensure that the public has access to information, that there are reasonable periods for each stage in the decision-making procedure, that notice is given, and an opportunity to be heard.

The CJEU has determined that the Aarhus Convention right to participate applies to the AA procedure, where there are likely significant effects on a European site. SI 293/2021 provides for public participation following an AA Screening Determination that an AA is required. This has the consequence of producing multiple consultation procedures on a single application, however the later consultation facilitates access to the technical advice received by the Minister from prescribed bodies, on which members of the public concerned may comment.

The Aarhus Convention incorporates a duty to give reasons for the decision, having had due regard to the submissions and observations of the public. This statutory duty to give reasons and considerations is found in the Forestry Act 2014 and the Forestry Regulations 2017.

1.14 Climate Law and the EU Green Deal – Chapter 12

This Chapter outlines the key EU and domestic legislation and policy drivers under the EU Green Deal and EU Forest Strategy, the Climate Action Act and Climate Action Plan, and the advice of the Climate Change Advisory Council to the Government in relation to the role that afforestation must play in reaching Ireland's climate targets.

This Chapter advocates for a plan-led approach to facilitate the streamlining of the necessary regulatory controls to ensure that an immediate and rapid acceleration in the volume of afforestation licences can be facilitated in the future. A key part of this process will be to identify the site selection criteria for various types of forestry, having consulted with key stakeholders on this issue. This would build on the Indicative Forest Statement in 2008, and feed in to the Land Use Review which the EPA has commenced, and which is provided for in the Climate Action Plan 2021.

2 Water Framework Directive (WFD)

2.1 Key points

This Chapter describes the objectives of the Water Framework Directive 2000/60/EEC[12], with relevance to the forestry sector.

Forestry can be a significant pressure on certain water bodies, including surface waters such as lakes, rivers, streams, and transitional waters around the coast, and to a lesser extent, groundwater bodies such as aquifers.

The WFD contains two key obligations: the obligation to prevent deterioration, and the obligation to enhance the status of water bodies.

The obligation to prevent deterioration of the status of a water body applies to surface waters (Article 4(1)(a)(i)) and groundwater (Article 4(1)(b)(i))[13]. The EPA is required to classify surface water bodies according to their ecological status or potential, and chemical status, and to identify such bodies and their status on river basin district mapping[14].

Forestry has been identified as a significant pressure on 'at risk' water bodies[i]. DAFM is required to implement the programme of measures adopted under the relevant River Basin Management Plan[ii].

DAFM, as a competent authority under the Forestry Act, is obliged to refuse to authorise any project (or measure) liable to result in deterioration of the status of a water body[15]. This entails an obligation to check whether the proposed project could cause deterioration of the existing status of a water body or jeopardise the attainment of 'good' status which, according to the High Court in *Sweetman (Bradán Beo)*[16], can only be done when the EPA has previously classified the water body concerned.

The Court has referred questions to the CJEU[17], asking:

- Are Member States required to characterise and classify *all water bodies,* irrespective of size?[iii] The EPA's position is that ecologically insignificant water bodies may be left unclassified.
- Is the obligation different for water bodies in a protected area?
- If classification is needed for all water bodies, can the competent authority consent to a project that may affect the water body prior to it being categorised and classified?
- If classification is not required for all water bodies, can the competent authority consent to a development which is liable to affect the unclassified water body.

The CJEU ruling is pending.

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[i] Page 41 River Basin Management Plan 2018-2021: "*Forestry is a significant pressure in 238 (16%) water bodies identified as At Risk. This equates to 215 rivers, 18 lakes, and 5 groundwater bodies. The pressure is largely associated with sediment from clear felling, drainage, and planting and establishment. The significant pressure is predominantly located in catchment headwaters and is often coincident with catchment boundaries (Figure 5.3d).*" Forestry is identified in the RBMP as a significant pressure for 40% of High Ecological Status waters, and 23% of SACs with water-dependent habitats and species.

[ii] The River Basin Management Plan (RBMP) 2018-2021. A new RBMP 2022-2027 is subject to ongoing consultation and preparation.

[iii] For example, a lake below 0.5km^2. The EPA has completed the classification of all surface water bodies other than 'insignificant' surface water bodies.

2.2 Water Framework Directive - Overview

2.2.1 Objectives

The WFD establishes a framework for the protection of inland surface waters, transitional waters, coastal waters, and groundwater. The objectives of the WFD are to:

(a) Prevent further deterioration and protect and enhance the status of aquatic ecosystems and, regarding their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems.
(b) Promote sustainable water use based on a long-term protection of available water resources.
(c) Aim at enhanced protection and improvement of the aquatic environment, *inter alia*, through specific measures for the progressive reduction of discharges, emissions, and losses of priority substances and the cessation or phasing out of discharges, emissions, and losses of the priority hazardous substances.

Article 3(1) of the WFD provides:

> *'Member States shall identify the individual river basins lying within their national territory and, for the purposes of this Directive, shall assign them to individual river basin districts. Small river basins may be combined with larger river basins or joined with neighbouring small basins to form individual river basin districts where appropriate. Where groundwaters do not fully follow a particular river basin, they shall be identified and assigned to the nearest or most appropriate river basin district. Coastal waters shall be identified and assigned to the nearest or most appropriate river basin district or districts.'*

Article 5(1) provides that Member States shall analyse the characteristics of each river basin district, review the impact of human activity on the status of surface waters and on groundwater, and undertake an economic analysis of water use in the manner specified in the Directive. Article 6 provides that a register shall be established of protected water sensitive habitats[18].

Articles 11 and 13 of the Water Framework Directive require a programme of measures to be included in a river basin management plan for each district, to be reviewed and updated at least every six years. The programme of measures is a tool for responding to the identified pressures to water bodies, thus enabling each river basin or body of water to reach good status[19].

2.2.2 River Basin Districts

(a) Ireland

The total area of the Republic of Ireland is approximately 70,000km^2. Ireland has a population of approximately 5 million. There are seven river basin districts, comprising 46 catchment management units consisting of 583 sub-catchments, with 4,829 water bodies.

(b) Denmark

By comparison, Denmark has a total land area of approximately 43,000km^2, and a population of 5.8 million. There are four river basin districts, including land and sea areas (inlets and fjords), which are subdivided into 23 main water catchments areas.

(c) Belgium

Belgium has a much larger population of over 11 million, with a total land area of a little over 30,000km^2. Belgium has four river basin districts, two of which cover most of the Belgian territory. Belgium shares river basin districts with neighbours France, Netherlands, Luxembourg, and

Germany. Within Belgium, responsibility for the implementation of the Water Framework Directive is split between the three regions: Walloon Region, Flemish Region, and Brussels-Capital Region.

2.2.3 River Basin Management Plan (RBMP)

The RBMP (2018 – 2021) is a national plan covering all river basin districts in Ireland[iv]. It identifies 2,113 water bodies classified as "Not at Risk" and 1,460 water bodies classified as "At Risk". The remaining water bodies required further investigation. Water bodies classified as "At Risk" include those which are at risk of not achieving "good status" or "high status" due to various pressures, including forestry which is listed as a significant contributing factor in approximately 16% of the 1,460 water bodies classified being "At Risk" [v]. Forestry is a significant pressure in 40% of High-Ecological Status waters and 23% of SACs with water dependent habitats and species.[vi]

A DAFM document, *Forestry and Water: Achieving the Objectives and Priorities under Ireland's River Basin Management Plan 2018–2021*[vii] outlines legislative, policy, regulatory and promotional elements to safeguard water during forestry operations. This is referenced in Section 7.3 of the RBMP (2018-2021). Measures include the restructuring of existing forests to reflect water sensitivities and situating and designing new forests to contribute to the attainment of the environmental objectives of the RMBP (2018-2021).

Additionally, DAFM document '*Environmental Requirements for Afforestation December 2016'* describes setback distances for forest planting, from water, habitats, archaeology, landscape, roads and utilities, and the built environment. DAFM document *'Land Types for Afforestation 2017'*, classifies land types in terms of productivity and eligibility for support under the Afforestation Scheme. DAFM document '*Indicative Forest Statement 2008*' uses several data sets to produce a spatial map and identify areas which are considered suitable or unsuitable for forestry, or suitable/unsuitable for certain types of forestry.

Generic mandatory measures to protect water quality, as set out in these statutory and non-statutory plans, give effect to the objectives of the WFD, This includes so-called 'no go' zones as water setbacks. The ability of DAFM Inspectors to rely on these measures is discussed in **Chapter 6** in the context of Appropriate Assessment Screening under Article 6(3) of the Habitats Directive and informs a key recommendation in the Regulatory Review Report.

2.3 Obligation to Prevent Deterioration

Article 4(1)(a) of the WFD provides that, in implementing (making operational) the programme of measures for surface waters,

> (i) Member States shall implement the necessary measures to *prevent deterioration of the status of all bodies of surface water.*

Article 4(1)(a) sets out obligations which are *binding as to their effect*, subject only to the very limited derogation provided for in Article 4(6) for temporary breach, and Article 4(7) in respect of specific projects or interventions[20]. Unless a derogation is granted, any deterioration of the status of a body of water must be prevented, irrespective of the long-term planning provided for in the RBMP or programme of measures.

[iv] https://www.gov.ie/en/publication/429a79-river-basin-management-plan-2018-2021/ Previously there were seven river basin management plans for the period 2009-2015, covering each of the seven RBDs. The move towards a single national plan was explained in the latest plan as being more efficient, better governance, and greater accountability in terms of realistic targets to be met. Public consultation on the draft River Basin Management Plan 2022-2027 closed 31 March 2022.

[v] Page 41 RMBP (2018-2021)

[vi] Page 45 RMBP (2018-2021)

[vii] https://www.catchments.ie/significant-pressures-forestry/

Necessary measures, includes the approval of projects[viii]. The obligation to *prevent deterioration* of a surface water body is ongoing and binding at each stage of implementation of the Directive and is applicable to every surface water body type and status for which a management plan has been, or ought to have been, adopted. Article 4(1)(b) imposes, in respect of groundwater, obligations which are largely identical to those laid down for surface waters[21].

A Member State is consequently bound to refuse consent to a project where it could result in deterioration of the status of the body of water concerned, or to jeopardise the attainment of "good status" for surface water or groundwater, subject to the derogations also provided for in Article 4.

Consequently, Article 4 of the WFD requires DAFM to check in advance whether a proposed project may have adverse effects on water which would be contrary to the requirements to prevent deterioration and to improve the status of bodies of surface water and groundwater.

2.3.1 What is meant by 'deterioration'?

Surface waters are classified by the EPA by reference to biological and chemical quality elements listed in an Annex to the WFD. The status of a water body will have deteriorated as soon as one of those quality elements falls by one class, even if it does not result in a fall in the overall classification of the water body[22]. If the quality element is already in the lowest class, any further reduction in quality will constitute deterioration of the status of that water body.

2.3.2 How does the decision-maker check for 'deterioration'?

In Case C-461/13 *'Weser'* the Advocate General held that *"the starting point should be the current status of the body of water concerned."* In *Sweetman (Bradán Beo)* the High Court considered that it is not possible to check whether a proposed project will cause deterioration to the status of a water body or jeopardise the attainment of good surface water quality unless the status of the water body has been established by the EPA. The EPA intervened in the case, stating that it has a discretion not to classify water bodies which it considers are ecologically insignificant and/or insignificant in terms of the attainment of the objectives of the Directive.

The Court has referred questions to the CJEU[23], asking:

- Are Member States required to characterise and classify *all water bodies,* irrespective of size? The EPA's position is that ecologically insignificant water bodies may be left unclassified.
- Is the obligation different for water bodies in a protected area?
- If classification is needed for all water bodies, can the competent authority consent to a project that may affect the water body prior to it being categorised and classified?
- If classification is not required for all water bodies, can the competent authority consent to a development which is liable to affect the unclassified water body.

2.3.3 What is the 'project' for the purposes of Article 4(1)(a)(i) WFD?

In *An Taisce (Kilkenny Cheese)*[24] the Supreme Court determined that the project which must be checked pursuant to Article 4(1)(a)(i) is the project for which consent is sought. That case involved a cheese factory, and the Court held that it would be "*entirely unrealistic"* and "*divorced from reality*" to require An Bord Pleanála to check the potential impact of the 4,500 supplier farms on the status of lakes, rivers, streams, and other surface water bodies in their vicinity, before granting permission for the factory.

[viii] Projects in this context was not defined by the CJEU, however it is likely to correspond to the definition of 'project' under the EIA and Habitats Directives.

2.3.4 In what circumstances can a deterioration in the status of a water body be authorised?

Article 4(6) of the WFD also allows a temporary deterioration for natural causes, unforeseeable exceptional force majeure circumstances (such as extreme flooding or prolonged drought) or unforeseen accidents. This 'force majeure' derogation is subject to strict conditions, and will only apply in exceptional, unforeseeable circumstances.

In Case C-251/21, *Piltenes meži SIA v Lauku atbalsta dienests*[25], however, the CJEU clarified that a Member State or its competent authorities may not simply disregard temporary impacts of short duration unless it is clear that such impacts have, by their very nature, little incidence on the state of the water body concerned. Any deterioration to the status of the water body concerned, even temporary deterioration, may be authorised only if the cumulative conditions of Article 4(7) are fulfilled.

Article 4(7) permits a derogation from the obligation to prevent deterioration of the status of a water body for: (i) new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or (ii) new sustainable human development activities (a category which could arguably include forestry).

As a derogation from the objective to prevent deterioration, however, Article 4(7) must be narrowly construed and applied restrictively. It will only apply where all the following conditions are applicable:

> *(a) all practicable mitigation steps are taken;*
>
> *(b) where the status is affected by modifications/alterations to the water body, the reasons must be explained in advance in the RBMP;*
>
> *(c) the benefits of good /improving water status under the WFD are outweighed by the benefits to human safety or to sustainable development; and*
>
> *(d) the benefits cannot be achieved by more environmentally friendly alternative means.*

The WFD would not permit the derogation to be applied generally to a whole class of project, such as afforestation. It is clearly intended to be applied solely on a case-by-case basis, following a project-specific analysis of the application of all the derogation conditions.

For example, in Case C-346/14 *Commission v Austria*, the CJEU held that any deterioration of the status of a surface water body must be prevented, unless a derogation is granted under Article 4(7), which is subject to satisfaction of conditions (a) – (d)[26]. Austria was entitled to decide that a renewable energy hydropower plant was sustainable development of overriding public interest in pursuant of worthy environmental objectives[27]. Austria demonstrated that the expected benefits of the project outweighed the potential deterioration of the water body, that all practicable steps to mitigate adverse impacts had been taken, and that the objectives pursued by the project could not, for reasons of technical feasibility or disproportionate cost, be achieved by other means which would have been a significantly better environmental option.

Deterioration of the status of a water body is a significant effect on the environment which is subject to assessment under the EIA Directive. In Case C-411/17 *Inter-Environnement Wallonie,* the CJEU held that, where a project requires EIA, the EIAR should include all necessary data to assess the effects of the proposed project on the status of the affected water body. This data need not necessarily be contained in a single document, but the public concerned should have an effective opportunity to participate, and therefore the data should not be obscured.

2.4 Obligation to Enhance

The obligation to enhance water bodies is intrinsically linked with, but exists as separate legal requirement to, the obligation to prevent deterioration of the status of water bodies. Article 4(1)(a) provides that, in implementing (making operational) the programme of measures for surface waters,

> (ii) Member States shall *protect, enhance, and restore all bodies of surface water*, (with the exception of artificial and heavily modified bodies of water), with the aim of achieving *good surface water status*.
>
> (iii) for artificial and heavily modified bodies of water, the obligation is to protect and enhance such bodies with the aim of achieving good ecological potential and good surface water chemical status.

Article 4(1)(b) sets out similar requirements for groundwater.

3 The Habitats Directive

3.1 Key points

The Habitats Directive sets out obligations which are *binding as to their effect*.

The Habitats Directive 1992/43/EEC has two main sets of provisions:

- Articles 3 – 11 relate to the conservation of natural habitats and the habitats of species (SACs), and by virtue of Article 7, also the habitats of wild birds (SPAs).

- Articles 12 – 16 relate to the protection of the animal species listed in Annex IV (a) and the plant species listed in Annex IV (b). (Separately, the Birds Directive relates to the protection of wild birds).

Article 6(3) establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of a SAC or SPA, but likely to have a significant effect on it, is authorised only to the extent that it will not adversely affect the integrity of that site[28]. Any adverse effect on a SAC or SPA must be prevented, irrespective of the benefits of the proposed project. There is limited scope for derogation under Article 6(4), only where there are no alternatives, and where the specific project is established to be necessary for imperative reasons of overriding public interest.

Under Article 12, species must be strictly protected, wherever they occur in the wild. This protection is not limited by the boundaries of any site. Any derogation under Article 16 must be strictly construed and will apply only in exceptional circumstances.

A Member State is consequently bound to refuse consent to a project where it could result in an adverse effect on a SAC or SPA, or where it would not guarantee the strict protection of Annex IV(a) species or Annex IV(b) plants. The Habitats Directive requires DAFM to check in advance whether a proposed project is likely to have an adverse effect on a SAC or SPA or is likely to significantly disturb a plant or species. Unlike the WFD, the Habitats Directive prescribes specific procedures for conducting the necessary checks.

Afforestation and felling have the potential to significantly disturb protected species and birds and disturb or destroy their habitats, including resting and breeding places. Article 12 of the Habitats Directive and Article 5 of the Birds Directive impose an obligation on Member States to ensure that such disturbance / destruction is prohibited, and consequently there is an obligation to check in advance whether such impacts are likely to occur, and if so, to require all necessary mitigations to be put in place to avoid such impacts. If impacts cannot be avoided but the project must proceed, the Habitats Directive and Birds Directives provide a limited derogation procedure.

A 'project' for the purposes of the Habitats Directive is not a defined concept. The Directive applies to any works or activities which are likely to have a significant effect on a SAC or SPA. Afforestation, felling, forest roads etc., have the potential to have a significant effect on a SAC or SPA where there is a connection or pathway between the proposed project site and the SAC or the SPA. The Habitats Directive requires DAFM to check, or 'screen', in advance whether such connection exists.

3.2 Aims and Objectives of the Habitats Directive

Article 2 sets out the aims and objectives of the Habitats Directive including:

1. Ensuring biodiversity through the conservation of habitats and of wild fauna and flora.

2. Measures to maintain or restore, at favourable conservation status, natural habitats and species of Community (i.e., European) interest.

3. Taking account of economic, social, and cultural requirements and regional and local characteristics.

3.3 Natura 2000 Network

Article 3(1) provides that the Natura 2000 network shall comprise a coherent ecological network of special areas of conservation (SACs) designated under the Habitats Directive and the special protection areas (SPAs) designated under the Birds Directive[29]. The purpose of the Natura 2000 network is to enable the natural habitat types and species habitats to be maintained and restored to favourable conservation status.

Article 6(1) requires Member States to establish legal, administrative, or contractual conservation measures and management plans corresponding to the ecological requirements of each Natura 2000 site.

3.4 Obligation to avoid deterioration of habitats and disturbance of species

Article 6(2) requires Member States to take such steps as are necessary to avoid the deterioration of habitats and disturbance of species for which the sites have been designated. Passive deterioration (e.g., through neglect, lack of management) and active deterioration (through developments and activities) are both equally prohibited under Article 6(2)[30]. For example, permitting natural regeneration of woodland to develop within an SAC or SPA could, potentially, result in 'deterioration' of a habitat-type that is necessary for the conservation of a species for which the site has been designated. In another area, natural regeneration could substantially enhance the habitat. It all depends on the conservation objectives for the site concerned.

Steps under Article 6(2) may include legislation the effect of which limits the risks to SACs or SPAs, and which empowers the competent authority to take preventative and corrective steps to secure the conservation objectives of the sites concerned[31]. Article 6(2) serves to achieve the objectives of the Directive when Article 6(3) is not applicable or has not been correctly applied[32]. For example, in Case C-304/05 *Commission v Italy*[33], Italy had authorised without AA, the felling of 2,500 trees within a SPA. Breeding sites were destroyed and the CJEU held that Italy had failed to comply with Article 6(2), in failing to avoid the deterioration of habitats and disturbance of species for which the SPA had been designated.

In Case C-226/08 *Stadt Papenburg*[34], the CJEU held that, even if Article 6(3) did not apply to the regular marine dredging, Member States remained obliged under Article 6(2) to take such steps as are necessary to preserve and protect the conservation objectives of the European site concerned. This includes ensuring that activities authorised prior to the transposition of the Directive do not cause deterioration of habitats or disturbance of species.

In Case C-399/14 *Grüne Liga Sachsen*[35] a bridge built without AA under Article 6(3), authorised before but constructed after the SAC was designated, is subject to Article 6(2) even if Article 6(3) does not apply. Article 6(2) does not set out *precise* protective measures, such as an obligation to examine or review the implications of a plan or project for natural habitats and species. It establishes a *general and ongoing* obligation to protect the site, to take the *appropriate steps,* including any protective measures, to avoid deterioration and disturbance of habitats or the habitats of species for which the site is designated. Article 6(2) therefore implies an obligation to carry out a *review* of the project already authorised and constructed, as *an appropriate step* to conserve and protect the site.

To ensure that Article 6(2) achieves the same level of protection as Article 6(3), this would imply that the review of the project must be capable of excluding the likelihood of significant deterioration or disturbance to habitats and the habitats of species, and in that sense, the review of a project pursuant to Article 6(2), where the project has already been carried out, should seek to comply with the requirements of the Article 6(3) procedure.

3.5 Appropriate Assessment of plans and projects

Recital 10 of the Habitats Directive provides that an Appropriate Assessment (AA) is required of any plan or programme *likely to have a significant effect* on the conservation objectives of a site which has been designated or is designated in the future.

Article 6(3) establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect on it, is authorised only to the extent that it will not adversely affect the integrity of that site[36].

The AA screening procedure is set out in **Chapter 6.** The purpose of the AA screening procedure is to ascertain whether there are likely significant effects on a SAC or SPA. If significant effects are likely or cannot be excluded based on objective scientific evidence, a full AA is required, as described in **Chapter 7.**

3.6 Article 6(4) Derogation procedure

Article 6(4) sets out a limited derogation from the absolute prohibition on authorising any plan or project that would adversely affect the integrity of a Natura 2000 site. Article 6(4) cannot be relied upon where there are alternative solutions which would not adversely affect the integrity of a Natura 2000 site. As alternatives are available to most proposed forestry projects, Article 6(4) will be of limited practical benefit to the forestry sector.

3.7 SPAs designated under the Birds Directive

Article 7 ensures that, from the date that the Habitats Directive came into force, or from the date on which an SPA is designated as a proposed SPA (whichever is later), the duties and obligations outlined above are applicable to both SACs and SPAs.

3.8 Ecological corridors and 'stepping-stones' under Article 10

Member States shall encourage the management of features of the landscape which are of major importance for wild fauna and flora, for example by virtue of their linear and continuous structure (such as rivers with their banks or their traditional systems for marking field boundaries) or their functions as stepping-stones (such as ponds or small woods) are essential for migration, dispersal, and exchange of wild species.

Where they consider it necessary, Member States may, through land-use planning and development policies, or such other means as they see fit, seek to utilise Article 10 of the Habitats Directive to improve the ecological coherence of the Natura 2000 network.

Article 10 is not binding on Member States, but it is an important legal instrument at an EU level to try to achieve coherent ecological networks and corridors between Member States and between Natura 2000 sites. As Natura 2000 sites only cover a small selection of habitats and species that are important at the European scale, Article 10 provides a means to support other non-listed habitats and species, that are of great regional, national, and local value for nature, biodiversity, landscape, and overall health.

Article 10 envisages being implemented through the means of land use plans, such as the National Planning Framework, or County Development Plans. In this context, the establishment and use of ecological corridors comprising biodiverse forestry has significant potential as a land use approach to supporting a coherent ecological network of and between Natura 2000 sites and other sites of national importance.

3.9 Strict protection of species listed in Annex IV (a), and the derogation procedure

Article 12 lays down requirements for Member States to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range.

The animal species listed in Annex IV(a) include: **Kerry slug (*Geomalacus maculosus*)**, **otter (*Lutra lutra*)**, and bat species many which favour broadleaf native woodland, including Leisler's bat (*Nyctalus leisleri*), brown long-eared bat (*Plecotus auritus*), whiskered bat (*Myotis mystacinus*), Daubenton's bat (*Myotis daubentonii*) Natterer's bat (*Myotis nattereri*), Nathusius' pipistrelle (*Pipistrellus nathusii*) soprano pipistrelle (*Pipistrellus pygmaeus*), common pipistrelle (*Pipistrellus pipistrellus*), and **lesser horseshoe bat (*Rhinolophus hipposideros*).**

The species highlighted in bold are listed in both Annex II and Annex IV (a). They are protected under both Article 6(3) and Article 12.

Article 16 lays down a limited derogation procedure from the strict protection regime under Article 12, but only where there is no satisfactory alternative, and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. This is discussed in **Chapter 4**.

3.10 Strict protection of species listed in Annex IV (b), and the derogation procedure

There is a further strict protection regime required for plant species listed in Annex IV (b), prohibiting the *deliberate* picking or destruction of those plants in their natural range in the wild. This strict protection regime for Annex IV (b) plant species also requires Member States to take the requisite measures to protect those species from harm. The derogation procedure under Article 16 applies also to the strict protection regime for plant species under Article 13.

Article 13 emphasises the need to have a system which ensures that no works are permitted to proceed without a derogation under Article 16, where the works would involve the *deliberate* cutting, uprooting or destruction of plant species listed in Annex IV (b) in their natural range in the wild.

3.11 Transposition of the Habitats Directive into Irish law

The Directive is transposed by EC (Birds and Natural Habitats) Regulations 2011[37] and parts of the Wildlife Act 1976, as amended. The EC (Birds and Natural Habitats) Regulations apply to decisions and projects under the Forestry Act 2014, and there is, accordingly, no benefit to having a separate and parallel AA procedure under the Forestry Regulations 2017 (SI.191/2017, particularly where the provisions are not consistent[ix].

[ix] The Regulatory Review Report contains a recommendation to revoke the part of the Forestry Regulations dealing with AA procedures.

4 Strict Protection of animals listed in Annex IV (a) of the Habitats Directive

4.1 Key points

Article 12 of the Habitats Directive requires a strict protection regime for animal species listed in Annex IV (a). Annex IV(a) species would include otter, and certain species of bat. The strict protection regime applies wherever those species occur. Some Annex IV(a) species are also listed in Annex II and are subject to the protection of the Natura 2000 network and Article 6(3).

Legislation alone is not sufficient to establish a system of strict protection. Strict protection measures must be *effective* in preventing harm. A strict protection regime should enable the competent authority to *anticipate activities which could be harmful* to the species protected by the Habitats Directive.

The Forestry Regulatory regime does not expressly invoke Article 12 strict protections. This is done indirectly through the EC (Birds and Natural Habitats) Regulations (Regulation 51), which are applicable to decisions made under the Forestry Act. The Forestry Act does not provide expressly that a person granted a licence should also obtain a derogation licence where necessary, but DAFM would typically attach a note or condition to that effect. In *Hellfire Massy Residents Association* the High Court has referred for a preliminary ruling questions related to the separate, parallel procedure for granting permission under the Planning Acts, and the potential availability of a derogation licence under SI 477/2011. The terms of the reference note that, where there is a potential risk to a species or specimen, contrary to Article 12, the Planning Acts leave it up to the developer to apply for a derogation licence before acting on the permission. (The same is true of the Forestry licensing system.) The CJEU is asked to determine whether this constitutes a 'strict protection regime' in accordance with Article 12. The CJEU is also asked to consider whether the derogation licence procedure under Article 16 of the Habitats Directive requires public participation.

4.2 Annex IV(a) species

The strict protection regime under Article 12 of the Habitats Directive applies to Annex IV (a) species of animal. It can be challenging to define in advance or with precision the sites or areas forming their natural range. Consequently, it is difficult to exclude the possibility that a specific geographic area in which afforestation or felling are proposed has no Annex IV (a) species unless there is adequate desktop and/or site survey data.

Annex IV (a) species that might interact with forestry activities includes:

- **Kerry slug (*Geomalacus maculosus*)**,
- **otter (*Lutra lutra*)**,
- bats: including Leisler's bat (*Nyctalus leisleri*), brown long-eared bat (*Plecotus auritus*), whiskered bat (*Myotis mystacinus*), Daubenton's bat (*Myotis daubentonii*) Natterer's bat (*Myotis nattereri*), Nathusius' pipistrelle (*Pipistrellus nathusii*) soprano pipistrelle (*Pipistrellus pygmaeus*), common pipistrelle (*Pipistrellus pipistrellus*), and **lesser horseshoe bat (*Rhinolophus hipposideros*).**

These species are among those guaranteed strict protection under Article 12 of the Habitats Directive. The species highlighted in bold are those which are also protected under Article 6(3). Such species are protected, therefore, wherever they may occur as well as in connection with the SAC designated for their protection[38].

4.3 Article 12 of the Habitats Directive

"Member States shall take "the requisite measures to establish a **system of strict protection** for the animal species listed in Annex IV(a), prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places."

4.3.1 The Concept of 'deliberateness'

Article 12(1) (a) – (c) refer to deliberate acts of killing of specimens or disturbance of species or destruction of eggs. The concept of 'deliberateness' was considered by the CJEU and the Advocate General in joined Cases C-473/19 and C-474/19 Föreningen Skydda Skogen and Others ('Swedish Logging')[39]. They noted the CJEU's previous rulings in Case C-221/04 *Commission v Spain;* Case C-504/14 *Commission v Greece (Kyparissia)* which established that an act under Article 12(1)(a)-(c) is deliberate where the author of the act intended to capture or kill, disturb, or destroy, or accepted the possibility that the specimen would be captured or killed, disturbed or that its eggs would be destroyed.

Land development, felling / logging and other such activities could come within the concept of a *deliberate* act where the person knows or accepts the possibility that a harm to a specimen, or the eggs of a specimen, could occur, even if the person did not set out with that purpose. Acting with disregard to the risk of harm to the specimen, or to the eggs of a specimen, constitutes a deliberate act, according to the CJEU.

4.3.2 The Concept of 'deterioration' or 'destruction'

Article 12(1)(d) does not involve the concept of deliberateness. The deterioration or destruction of breeding sites or resting places could occur, for example, through neglect, or failure to take *the requisite measures*, or other non-deliberate acts leading to harm[40]. The CJEU has determined that the undefined terms of 'deterioration' and 'destruction' in Article 12(1)(d) must mean, respectively, the action of getting or making worse, including the action of weakening gradually, and the action of demolition[41]. The CJEU has held that, by not limiting the prohibition laid down in Article 12(1)(d) to deliberate acts, the EU legislature must have intended to give breeding sites or resting places *increased protection against acts causing their deterioration or destruction[42].*

The CJEU has held that the restriction in Article 12(1)(d) prescribes a regime providing for the strict protection of the breeding sites and resting places of the species listed in Annex IV(a) *regardless of their numbers[43]*. In Case C-383/09 *Commission v France[44]* the CJEU held that the system of strict protection must make it possible to effectively prevent the deterioration or destruction of breeding sites or resting places of these species.

In Case C-477/19 *IE v Magistrat der Stadt Wien[45]* the European hamster (*Cricetus cricetus*) is listed in Annex IV (a) and the referring Court asked whether the *undefined* term 'resting place' in Article 12(1)(d) includes a place which is *no longer occupied by one of the species*. The CJEU noted that, unlike the acts referred to in Article 12(1)(a) – (c) which relate to acts directed towards species or their eggs, Article 12(1)(d) seeks to protect significant parts of their habitats. The CJEU referred to the EC Guidance on species protection and noted that resting places are defined there as the areas essential to sustain an animal or group of animals when they are not active, and that these also need to be protected while they are not being used but there is a reasonably high probability

that the species will return to these places. Consequently, the CJEU held that Article 12(1)(d) requires that resting places that are no longer occupied by an Annex IV (a) species must not be allowed to deteriorate or be destroyed if there is a likelihood that they might return to the place. The CJEU held that it would not be compatible with the strict protection regime or objectives to deny protection for resting places of an Annex IV (a) species where they are no longer occupied but where there is a *sufficiently high probability that species will return to such places*.

In a subsequent follow-up ruling of the CJEU on the European hamster case[46], the CJEU held that the undefined term '*breeding site*' applies to all the areas necessary for the animal to reproduce successfully, including the surroundings of the breeding site (in this case, the surroundings of the burrows of the European hamster). To ensure the strict protection of the species, the protection of their breeding and resting sites must continue for so long as is necessary for the animal to reproduce successfully. This includes protection of breeding sites that are unoccupied where there is a sufficiently high probability that the animal will return to those sites. Therefore, the protection afforded to breeding sites of Annex IV (a) species is not limited to just the actual and specific period of breeding or gestation or rearing.

Under Article 12(1)(d), the CJEU held that the term 'deterioration' means the action of getting or making worse, or the progressive reduction of the ecological functionality of a breeding site or resting place of an Annex IV (a) species, and 'destruction' means demolition, or the total loss of ecological functionality of a breeding site or resting place, irrespective of whether such harm is intentional.

4.3.3 The concept of a 'strict protection regime'

A strict protection regime in accordance with Article 12 must enable the competent authority to *anticipate which activities could be harmful* to the species protected by the Habitats Directive, it being immaterial in that regard whether the *purpose* of the activity consists of the killing or disturbance of those species.

The CJEU in Case C-441/17 *Commission v Poland (Białowieża Forest),* held that a strict protection regime compliant with Article 12 must enable the actual avoidance of deliberate capture or killing of species in the wild, and of deterioration or destruction of breeding sites or resting places, of the Annex IV(a) animal species. It is not sufficient simply to adopt legislation prohibiting such acts; the legislation must be implemented through concrete and specific protection measures.

4.4 The Strict Protection Regime as it applies to Forestry

Article 12 of the Habitats Directive is not expressly incorporated to either the Forestry Act 2014, or the Forestry Regulations.

The Forestry Act requires the Minister to have regard to and take particular account of the habitats and species in forests, and to screen for EIA and screen for AA, and to carry out EIA and AA where required. The Forestry Regulations 2017 (S.I. 191/2017) sets out the information to be included in an EIAR including information on species protected under the Habitats Directive, but there is no express reference to Article 12 or species protection.

The applicable law, therefore, is the EC (Birds and Natural Habitats) Regulations. A project or activity for the purposes of the Habitats Regulations includes anything which requires a decision under the legislation in the Second Schedule to the Regulations, which includes the Forestry Acts. The obligations imposed on public authorities by the Habitats Regulations are therefore applicable to decisions of the Minister under the Forestry Act.

Regulation 51 of the Habitats Regulations establishes a strict protection regime for the animal species in Annex IV (a) of the Habitats Directive, mirroring Article 12.

Regulation 51(2) provides that, notwithstanding any other consent given by any other public authority or otherwise held, except in accordance with a derogation licence granted by the Minister under Regulation 54, it is prohibited:

(a) to deliberately capture or kill any specimen of the species in the wild;

(b) to deliberately disturb these species particularly during periods of breeding, rearing, hibernation, and migration;

(c) to deliberately take or destroy eggs of the species from the wild;

(d) to damage or destroy a breeding site or resting place of such an animal; or

(e) to keep, transport, sell, exchange, offer for sale or offer for exchange any specimen of these species taken in the wild, other than those taken legally as referred to in Article 12(2) of the Habitats Directive.

Regulation 51(4) provides for a monitoring system to be established to monitor the *incidental* capture or killing of fauna, and to take such measures as are required to ensure that such *incidental* capture or killing does not have a significant impact on the species concerned.

4.5 Strict Protection subject to a separate, parallel procedure

Section 34(13) of the Planning Acts provides that a person shall not be entitled solely by reason of the grant of planning permission to carry out the proposed development. Where additional consents are required, it is for the person carrying out the development to ensure that they are secured prior to the commencement of development. There is no similar provision in the Forestry Act 2014 (or the Forestry Regulations)[x]. DAFM practice, however, is to include a note or condition in a licence to this effect.

In *Redmond*[47] the High Court confirmed, by reference to Section 34(13) of the Planning Acts, that the grant of planning permission does not remove the need for compliance with other legal obligations. A condition attached to the grant of permission which stated that the developer shall apply for a derogation licence under SI 477/2011, if required, is just a statement of the law. It does not add anything over what is already a binding legal obligation[48].

In *Hellfire Massy Residents Association*[49] the High Court has referred for a preliminary ruling questions related to the separate, parallel procedure for granting permission under the Planning Acts, and the potential availability of a derogation licence under SI 477/2011. The terms of the reference note that, where there is a potential risk to a species or specimen, contrary to Article 12, the Planning Acts leave it up to the developer to apply for a derogation licence before acting on the permission. The CJEU is asked to determine whether this constitutes a 'strict protection regime' in accordance with Article 12. The CJEU is also asked to consider whether the derogation licence procedure under Article 16 of the Habitats Directive requires public participation, having regard to the CJEU's ruling in Case C-243/15 *Lesoochranárske zoskupenie* (*LZ*)[50].

4.6 Article 16 derogation decision part of EIA development consent procedure

In Case C-463/20 *Namur-Est Environnement ASBL v Région Wallonne*[51], the CJEU held that a derogation decision under Article 16 of the Habitats Directive, which authorises a developer to derogate from the applicable species protection measures in order to carry out a 'project' as defined in the EIA Directive, forms part of the 'development consent procedure' as defined in the EIA Directive, where (1) the project cannot be carried out without the derogation and (2) the

[x] It is a Recommendation in the Regulatory Review Report that such a provision should be inserted.

competent authority with responsibility for deciding whether to grant development consent retains the ability to assess the project's environmental impact more strictly than was done in the derogation decision. To that end, the CJEU found that the adoption of such a preliminary derogation decision need not necessarily be preceded by public participation, provided that such participation is effectively ensured before the completion of the EIA and the development consent decision which permits the project to proceed.

In practice, sometimes the derogation licence is obtained before an application for development consent, and sometimes it is obtained afterwards. A derogation licence tends to be time-limited, running the risk that, by the time development consent is granted, the derogation will have expired and would require renewal.

4.7 Wildlife Act 1976 as amended

Section 20 of the Wildlife Act 1976 as amended, protects animal species listed in the Fifth Schedule to the Act. This list includes badger, bat, deer, hare, hedgehog, otter, pine martin, red squirrel, and the Natterjack toad.

It is an offence under s.23(5) to

(a) hunt a wild animal otherwise than with a permission or licence granted by the Minister under the Wildlife Act.

(b) hunt a wild mammal otherwise than with a gun licence and/or in accordance with open season for that species of animal.

(c) injure a protected wild animal otherwise than while hunting it, in accordance with a licence granted under the Wildlife Act, or subject to a gun licence / open season order.

(d) wilfully interfere with or destroy the breeding place or resting place of any protected wild animal.

Section 23 (7) provides that it is not an offence for a person:

*(a) while engaged in agriculture, fishing or aquaculture, **forestry** or turbary, unintentionally to injure or kill a protected wild animal, or*

(b) while so engaged to interfere with or destroy the breeding place of such an animal, or

(c) while constructing a road or while carrying on any archaeological operation, building operation or work of engineering construction, or while constructing or carrying on such other operation or work as may be prescribed, unintentionally to kill or injure such an animal or unintentionally to destroy or injure the breeding place or resting place of such an animal, or

(e) to kill humanely a protected wild animal which is either injured in the manner described in paragraph (a) of this subsection or captured in the manner described in paragraph (d) of this subsection, or so to kill a protected wild animal injured in the circumstances described in paragraph (c) of this subsection, and where the animal is so injured or disabled that there is no reasonable chance of its recovering.

Anything done pursuant to a licence will not be unlawful under the Wildlife Acts, however s.23(7A) provides that subsection (7) shall not apply to the species listed in Annex IV(a) of the Habitats Directive, as those species are subject to the strict protection regime set out in the EC (Birds and Natural Habitats) Regulations 2011 (SI 477/2011), as amended. Section 9(5) of the Wildlife Acts

provides that nothing may be done by licence or permit that would not be allowed to be done under the EC (Birds and Natural Habitats) Regulations or the Birds or Habitats Directives.

The legislation, therefore, provides for a strict protection regime, but it qualified to some extent by reference to activities carried out in the ordinary course of forestry, agriculture, road construction etc.,

4.7.1 Protection of vegetation which is the habitat of other species

Section 39 of the Wildlife Act 1976 as amended prohibits the burning of vegetation within one mile of another person's wood (or 'forest' within the meaning of the Forestry Act 2014), without prior notice to the Gardaí and the occupier of the wood, providing an opportunity to that person to object to the proposed burning on the grounds that it is liable to cause damage to the wood or land concerned.

Section 40 precludes the destruction of vegetation on uncultivated land, by cutting, grubbing, burning or otherwise destroying such vegetation, including in any hedge or ditch, between 1 March - 31 August, however exceptions are provided for certain interventions in the ordinary course of forestry, agriculture, or road works. Again, these provisions are all subject to the overriding strict protection regime for Annex IV (a) species of animal under the Habitats Directive. They are also subject to the protection regime for birds under the Birds Directive, discussed in Chapter 5.

4.8 Article 16 Derogation from the strict protection regime

Article 16(1) sets out a limited form of derogation from the strict protection guarantee under Article 12:

> '*Provided that there is no satisfactory alternative, and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):*
>
> *(a) in the interest of protecting wild fauna and flora and conserving natural habitats;*
>
> *(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;*
>
> *(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;*
>
> *(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;*
>
> *(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'*

Article 1(i) defines the conservation status of a species as

> '*the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2.*
>
> *The conservation status will be taken as "favourable" when:*

– *population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats,*

– *the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and*

– *there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis'.*

Article 1(m) defines a 'specimen' as including any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V.

Although Article 16(1) allows Member States to derogate from the strict protection regime in Article 12, the derogation is conditional on there being no satisfactory alternative, and that the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. This applies to all the derogation conditions under Article 16(1), which is an exception to the strict protection obligations and must therefore be interpreted restrictively and applied solely based on evidence which is specific to each derogation decision. In C-674/17 ('*Finnish Wolves*')[52] the CJEU held that Article 16(1)(e) applies only where conditions (a) – (d) are not relevant. A derogation decision must articulate sufficient reasons as to the absence of an alternative[53].

The derogation decision must define the objectives relied upon in support of the decision in a clear and precise manner, with supporting evidence. It must be applied appropriately to deal with precise requirements and specific situations. The CJEU held that such reasons must take account of best relevant scientific and technical evidence and in the light of the circumstances of the specific situation in question.

In Case C-463/20 *Namur-Est Environnement ASBL* the CJEU held that the derogation decision is part of the development consent procedure of a project under the EIA Directive, subject to the proviso that the competent authority with responsibility for the EIA decision shall remain at liberty to make a more restrictive decision than the prior derogation, having heard from the public in that regard.

4.9 Derogation under Forestry Licensing Regime

Decisions under the Forestry Act 2014 are subject to the EC (Birds and Natural Habitats) Regulations. Regulation 54 sets out derogations from the requirements of Regulation 51. Regulation 54(2) sets the conditions for a derogation to apply. It must be:

(a) in the interests of protecting wild fauna and flora and conserving natural habitats,

(b) necessary to prevent serious damage, to crops, livestock, forests, fisheries and water and other types of property,

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment,

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants, or

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species to the extent specified therein, which are referred to in the First Schedule.

Regulation 54(3) and (4) require the derogation licence to state the conditions, restrictions, limitations, or requirements on the exercise of the licence as the Minister considers appropriate. A derogations report shall be submitted to the EC every two years. These provisions need to be applied in accordance with Case C-674/17 ('*Finnish Wolves*').

DAFM is not the competent authority for the purposes of Regulations 51 or 54 of the EC (Birds and Natural Habitats) Regulations. That responsibility lies with the Minister for Heritage. These provisions will also be subject to such ruling as the CJEU may give in response to the reference in *Hellfire Massy*.

5 Protection of Birds under the Birds Directive

5.1 Key Points

The Birds Directive requires Member States to achieve the protection of all wild birds, not just those for which European sites are designated, or those that are endangered.

Article 4 covers Annex I birds for which SPAs are designated, and their protection extends beyond the boundary of the SPA to include ex situ habitats within their natural range. Article 5 covers all wild birds and requires Member States to put in place concrete and effective measures for their conservation and protection wherever they occur. These provisions are highlighted in the Regulatory Review Report as a key reason why a prior consent procedure for the purposes of checking ex situ impacts is necessary.

There is some tension between the rulings of the CJEU in Case C-441/17 and Cases C-473/19 and C-474/19, and the provisions of the Wildlife Acts, in relation to harms which may occur to birds during the ordinary course of agriculture, forestry, and land development activities. The prohibitions under the Wildlife Acts are limited to specific periods within the life of the species, whereas the Birds Directive as interpreted by the CJEU is more far-reaching.

Section 9(5) of the Wildlife Acts provides that: *nothing may be done by licence or permit that would not be allowed to be done under the EC (Birds and Natural Habitats) Regulations 2011 (SI 477/2011) or the Birds or Habitats Directives.* This provision is designed to avoid a challenge on grounds of incompatibility of the domestic legislation with EU law, however it creates significant legal uncertainty, and suggests that when applying the Wildlife Acts, it is necessary to interpret the Acts in a manner that is consistent with the CJEU's rulings on the Birds and Habitats Directives.

5.2 Purpose and Objectives of the Birds Directive

Article 1 provides that the Directive applies to the conservation of *all species of wild bird* naturally occurring within the territory of the EU, and that it covers the protection, management and control of these species and lays down rules for their exploitation.

Article 2 provides that Member States shall take the requisite measures to maintain the population of wild birds at a level which corresponds to the ecological, scientific, and cultural requirements while taking account of economic and recreational requirements, or to adapt the population of these species to that level.

Article 4 provides for the establishment of Special Protection Areas (SPAs) for certain species of bird listed in Annex I, and for migratory birds.

Article 4(4) of the Birds Directive provides that, in the SPAs referred to in Article 4(1) and (2), Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting Annex I birds, insofar as these would be significant having regard to the objectives of this Article.

Outside of the SPAs (*ex situ*) Article 4(4) provides that Member States shall strive to avoid pollution or deterioration of habitats. In this way, the protections afforded to Annex I species and migratory

bird species within SPAs are to be extended to their habitats within their natural range beyond the boundary of the SPA which was designated for their protection[xi].

The natural range of different species of bird varies enormously. Within the same species, the natural range varies at different times of the year. This is one of the reasons why it is not possible to define a standard 'zone of impact' applicable to all projects in all situations. The potential impact of a project on birds will depend on the species of bird concerned, as well as the nature of the project.

Article 4 of the Birds Directive requires Member States to adopt the measures necessary for the conservation of Annex I species and regularly occurring migratory species, as the most endangered species of the EU. In Case C-418/04 *Commission v Ireland* the CJEU held that the measures must be capable of ensuring the survival and reproduction of the bird species listed in Annex I and the breeding, moulting, and wintering of regularly occurring migratory species not listed in that Annex. Measures include positive measure to preserve or improve the state of the SPA as well as the avoidance of external anthropogenic impairment and disturbance[xii].

In **Case C-441/17** *Commission v Poland (Białowieża Forest)* the CJEU confirmed that it is not enough to simply establish conservation measures – they must be implemented.

The general conservation and protection measures in Article 2, and the general system of protection under Article 5, *apply to all wild birds naturally occurring within the EU*, which includes Annex I and migratory species and all other wild bird species within the EU.

5.3 General system of protection under Article 5

Article 5 provides that Member States shall take the requisite measures to establish a general system of protection for all wild birds in the EU, and wherever they occur, prohibiting in particular:

(a) deliberate killing or capture by any method;

(b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;

(c) taking their eggs in the wild and keeping these eggs even if empty;

(d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;

(e) keeping birds of species the hunting and capture of which is prohibited

Article 5 expressly applies to *deliberate* acts relating to *all wild birds*.

5.4 Derogation from general protection regime – Article 9

Article 9(1) of the Birds Directive provides a derogation from Article 5, only where there is no other satisfactory solution, and for the following reasons:

(a) Public health and safety; air safety; to prevent serious damage to crops, livestock, forests, fisheries, and water; or for the protection of flora and fauna.

[xi] Where there is a need to maintain an ex situ habitat to remain suitable for the needs of the species of bird using it, it may constitute deterioration in breach of Article 4(4) if it is left to naturally regenerate.

[xii] NPWS Programme of Measures (May 2017) and (February 2022), 'Birds Case', prepared in consultation with DAFM.

(b) For research and teaching; repopulation; reintroduction, and for the breeding necessary for these purposes; and

(c) To permit, under strict supervised conditions, the capture, keeping or other judicious use of certain birds in small numbers.

The scope of Article 9 is much narrower than Article 16 of the Habitats Directive. Article 9 does not expressly permit a derogation for *imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences for the environment*. As derogations are exceptions from the binding rules, they must be construed narrowly and strictly.

5.5 Case C-441/17 *Commission v Poland (Białowieża Forest)*

In **Case C-441/17** the CJEU held that Article 5 of the Birds Directive requires Member States to adopt the requisite measures to establish a *general* system of protection for all species of birds referred to in Article 1. Article 1 applies to all species of wild bird naturally occurring within the territory of the EU.

Article 5(b) prohibits the deliberate destruction of, or damage to, their nests and eggs or removal of their nests, and Article 5(d) prohibits the deliberate disturbance of those birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of the Directive.

The CJEU considered that Article 5 should be implemented in the same manner as Article 12, with concrete and specific protection measures, intended to protect the breeding sites and resting places of birds covered by the Birds Directive. Poland argued that the affected bird populations within the Natura 2000 site have remained stable or increased, and that there are larger populations of these species in other Natura 2000 sites. However, the CJEU held that the Article 5 obligations apply before any risk of protected species becoming extinct has materialised[54] and once the logging activity is a threat to the two species at issue, it is irrelevant that there are larger populations elsewhere.

5.6 Joined Cases C-473/19 and C-474/19 'Swedish Logging' cases

The Forestry Agency in the Swedish municipality of Härryda was notified of a proposal to fell most of the trees in a defined area, apart from a limited number of trees required to be kept in accordance with the applicable forest standards / guidelines. The area was not within a Natura 2000 site, but it was a known habitat of protected birds and other species[xiii].

On foot of the notification, the Forest Agency determined that the felling could proceed, subject to compliance with specific guidance and precautionary measures (recommendations, rather than legally binding rules/conditions). This was ultimately the subject of a Court reference to the CJEU.

Significantly, Swedish law did not distinguish between the strict protection regime for Annex IV(a) species under Article 12 of the Habitats Directive, and the general protection regime for all wild birds under Article 5 of the Birds Directive[55]. Both Annex IV(a) species and all wild birds, at all stages of life, were subject to a prohibition against:

1. deliberate capturing or killing;

[xiii] Lesser spotted woodpecker (*Dryobates minor or Dendrocopos minor*), western capercaillie (*Tetrao urogallus*), willow tit (*Poecile montanus or Parus montanus*), goldcrest (*Regulus regulus*) and coal tit (*Periparus ater or Parus ater*). The moor frog (Rana arvalis) can also be found in the area.

2. deliberate disturbance particularly during the period of breeding, rearing, hibernation, and migration;

3. deliberate destruction or taking of eggs in the wild; and

4. deterioration or destruction of breeding sites or resting places.

The CJEU made several significant findings in this case. Firstly, considering Case C-441/17, the CJEU held that Article 5 is to be implemented in the same manner as Article 12, with concrete and specific protection measures that must ensure effective compliance with the prohibitions in Article 5.

Secondly, the CJEU held that Article 5 covers all wild birds, not just those which are endangered, or listed in Annex I, or whose population is declining. The obligation under the Birds Directive is to try to maintain populations. This requires Member States to ensure *a sufficient diversity and area* of habitats for all the species of birds occurring naturally in the wild state in the EU, and effective protection of wild birds throughout the EU, irrespective of where they are[56].

Accordingly, the CJEU found that Article 4 covers Annex I birds (and the designation of SPAs for their protection), and Article 5 covers all birds naturally occurring in the wild.

Swedish law applied the Article 12 protections to all birds covered by Article 5, and the CJEU determined the case on that basis, declining to address the significant issue raised by the Advocate General in her prior opinion.

Advocate General Kokott pointed out that, in the CJEU's previous rulings on the concept of deliberateness as it arises in Article 12, (see paragraph 4.3.1 of this Report), the CJEU determined that it covers both where a prohibited act is intended, and where a different act is intended but the possibility of the harm occurring is accepted. Advocate General Kokott accepted that this broad purposive interpretation makes sense in the context of the finite list of Annex IV(a) species which are inherently vulnerable and rare.

Should the same concept of deliberateness be applied to Article 5 prohibitions, this would lead to many interactions and disturbances with wild birds in the ordinary conduct of human activity, including forestry, agriculture, or development of land. There would always be a degree of acceptance that when carrying out these activities, there is a possibility of causing harm.

She pointed out that the derogations under Article 9 are narrower than under Article 16, which makes sense if the system of *general protection* was not quite so restrictive as the system of *strict protection* provided under Article 12.

The Advocate General proposed that the prohibition on *deliberate disturbance* of wild birds under Article 5 should only apply to significant disturbance of the species at the local population level. The more vulnerable or at risk the species of bird, the higher level of protection necessary.

Article 5 does not express a threshold for the number of birds that must be disturbed before the prohibition on disturbance takes effect. The CJEU's previous rulings held that, in the absence of any express threshold, it must be assumed that the prohibition on deliberate disturbance would apply where a *single specimen* is deliberately killed or captured, or the nest or egg of a bird is deliberately destroyed or damaged.

There are certain populations that are known to be in decline, and such declines often come about after changes in the use of their habitats. The Birds Directive incorporates the requirement to designate SPAs for certain species, an obligation to protect the habitats of common species of birds and, if certain activities pose a risk to the conservation status of a particular bird species, the

Environmental Liability Directive[57] would apply to restrict such activity. In these circumstances, the Advocate General suggests that the kind of strict protection regime provided for under Article 12 might not be suitable to apply to all wild birds naturally occurring within the territory of the EU.

Advocate General Kokott recommended that the conservation status of the bird species concerned should be considered when determining whether there has been a breach of the prohibition on deliberate disturbance. For example, in Case C-441/17 the bird species involved were rare, the logging was being undertaken in a Natura 2000 site designated for that species, and deliberate disturbance of that species at that location would clearly impact its conservation status. On the other hand, deliberate disturbance of a common species, where the harm is not intended but only accepted as a possibility, should not constitute a prohibited act under Article 5. The Advocate General also recommended that disturbances should be prohibited under Article 5 where they have a significant effect on the birds concerned (for example during their most vulnerable breeding period).

The CJEU did not deal with this issue because the Swedish legislation applied the more stringent standard. This leaves some uncertainty regarding the precise meaning of deliberate in Article 5.

5.7 Flaws with the 'notification regime' in Cases C-473/19 and C-474/19 'Swedish Logging'

Regarding the Swedish felling notification regime at issue, the CJEU noted that

- no voluntary forestry plan had been submitted to or assessed by the Forest Agency in the context of processing the felling *notification*,
- the Forest Agency's guidelines are not binding,
- no criminal or other penalties are applicable in the event of non-compliance with the guidelines, and therefore no effective enforcement mechanism,
- the guidelines are not site-specific in that they do not contain any information on whether the protected species live in the area subject to felling,
- the Forest Agency had not examined whether the felling could be carried out fully in accordance with the prohibitions laid down in the Swedish environmental legislation, or the conditions specified in the guidelines,
- neither the felling notification nor the guidelines specify the time of year when the felling would be carried out,
- insofar as the area to be felled hosts the protected species, the CJEU found that the removal of the forest will lead to the disappearance of part of the natural habitat of those species and will thus threaten their survival in the long term.

5.8 Case C-661/20 Commission v Slovak Republic

In Case C-661/20 *European Commission v Slovak Republic*, the CJEU upheld infringement proceedings against Slovakia which, by its laws, had exempted forest management plans and modifications to FMPs from the obligation to carry out an AA, even where they are likely to have a significant effect on a European site. Similarly the Slovak legislation permitted emergency felling and the construction of forest roads without an AA of the implications for the European sites concerned, notwithstanding the risk both to the habitat and to certain bird species concerned. The CJEU found that the Slovak regulatory regime for the management of forestry, including emergency response operations, within and adjacent to European sites failed to ensure strict protection of

forest grouse species, contrary to Article 12 of the Habitats Directive and Article 5 of the Birds Directive.

5.9 Protection of Birds under the Irish Forestry Regime

There is limited provision for the protection of birds under the Forestry Act 2014, or the Forestry Regulations. The protection is applied indirectly via the Wildlife Act 1976, as amended by the EC (Birds and Natural Habitats) Regulations, as amended.

The EC (Birds and Natural Habitats) Regulations require public authorities, including the Minister under the Forestry Acts, to comply with the requirements of the Birds and Habitats Directives. Regulation 27(4) requires the Minister to:

(a) take the appropriate steps to avoid, in candidate special protection areas, pollution and deterioration of habitats and any disturbances affecting the birds insofar as these would be significant in relation to the objectives of Article 4 of the Birds Directive,

As noted, Article 4 covers SPA-designated birds under Annex I of the Birds Directive.

(b) outside those areas, **strive to avoid pollution or deterioration** of habitats, and

This obligation is not confined to Article 4/Annex I. It applies generally to the habitats of birds, outside of SPAs.

(c) take appropriate **enforcement** action.

The Minister has certain enforcement powers under the Forestry Act 2014 and the Forestry Regulations 2017, as amended. Primary responsibility for enforcing the EC (Birds and Natural Habitats) Regulations lies in the Minister for Heritage. There is a risk of enforcement slipping between these two responsible authorities.

Regulation 27(4) refers to *any disturbances affecting the birds insofar as these would be significant.* The disturbance, therefore, must be *significant*, but need not be *deliberate*.

Section 19(1) and section 22(3) of the Wildlife Act provides that all wild birds, including their nests and eggs, shall be protected ('protected birds'). This is consistent with Article 1 of the Birds Directive.

The following are offences under Section 22(4) of the Wildlife Acts:

(a) (i) hunting a protected wild bird, other than a protected wild bird which is of a species specified in an order under section 24 of this Act, otherwise than under and in accordance with a permission or licence granted by the Minister under this Act, or

(ii) hunting a protected wild bird which is of a species specified in an order under section 24 of this Act, otherwise than—

(A) under and in accordance with such a permission or a licence granted by the Minister under this Act other than section 29,

(B) under and in accordance with a licence granted under section 29 of this Act and (also) on a day, or during a period of days, specified in a relevant order under the said section 24,

(b) injures a protected wild bird otherwise than while hunting it,

(i) in case the protected wild bird is of a species other than a species specified in an order under section 24 of this Act, **under and in accordance with a licence** or permission granted by the Minister under this Act,

(ii) in case the protected wild bird is of a species so specified, either in the manner mentioned in clause (A) of paragraph (a) (ii) of this subsection, or in the manner and on a day, or during a period of days, mentioned in clause (B) of the said paragraph (a) (ii),

(c) **wilfully** takes or removes the eggs or nest of a protected wild bird otherwise than under and in accordance with such a licence,

(d) **wilfully** destroys, injures, or mutilates the eggs or nest of a protected wild bird,

(e) **wilfully disturbs** a protected wild bird on or near a nest containing eggs or unflown young.

The conditions for an offence under section 22(4) differ to Article 5 of the Birds Directive as interpreted by AG Kokott in Cases C-473/19 and C-474/19 'Swedish Logging'. The term '*wilful*' encompasses the concept of 'deliberateness' as previously discussed by the CJEU. It denotes both intention and disregard for the consequences of the action.

Section 22(4) of the Wildlife Acts is, however, narrower than Article 5 as interpreted by the CJEU. The CJEU considered that the prohibition on deliberate acts applied to all wild birds and at all stages of life. Section 22(4) is qualified to specific circumstances in which the birds are likely to be more vulnerable, which is when disturbance is likely to be more significant.

Section 22(5) lists derogations, including:

(b) while … **engaged in agriculture**, … **forestry** … **unintentionally** to **injure or kill** a protected wild bird, or

(c) … **to destroy unintentionally** the eggs or nest of a protected wild bird in **the ordinary course of agriculture or forestry**,

(d) …, or

(e) to **kill humanely** a protected wild bird which has been injured in the manner described in paragraph (b) **[e.g., while engaged in forestry],** or captured in the manner described in paragraph (d) or injured in the circumstances described in paragraph (h) **[while constructing a road or other works]** of this subsection and where the bird is so injured or disabled that there is no reasonable chance of its recovering, or

(f) […]

(g) …, or

(h) **while constructing a road** or while carrying on any archaeological operation, building operation or work of engineering construction or while constructing or carrying on such other operation or work as may be prescribed, **unintentionally to kill or to injure** a protected wild bird or to remove for conservation purposes or **unintentionally to destroy**, injure or mutilate the eggs or nest of a protected wild bird,

The list of derogations is considerably broader than Article 9(1) of the Birds Directive. The Birds Directive does not expressly carve out a special derogation regime for sectors such as forestry, agriculture, or land development. Unlike Article 16 of the Habitats Directive, Article 9 does not

expressly permit a derogation for *imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences for the environment*.

A 'saver' clause is found in section 9(5) of the Wildlife Acts, which provides that: **"***nothing may be done by licence or permit that would not be allowed to be done under the EC (Birds and Natural Habitats) Regulations 2011 (SI 477/2011) or the Birds or Habitats Directives."*

This creates uncertainty as to what is, and is not, permissible under the Wildlife Acts in the ordinary course of agriculture or forestry.

5.9.1 Other wildlife protection provisions under the Wildlife Acts

Under Section 11, the Minister for Heritage is to secure the conservation of wildlife and to promote the conservation of biological diversity, and without prejudice to the generality of this duty, the Minister for Heritage may do any of the things listed in subsection (2) including

> *(bc) take the requisite measures to maintain the population of the species referred to in Article 1 of the Birds Directive at a level that corresponds in particular to ecological, scientific, and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level,*
>
> *(bd) take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats by the preservation, maintenance and re-establishment of biotopes and habitats for all of the species of birds referred to in Article 1 of the Birds Directive, in particular the following measures —*
>
> *(i) the creation of European Sites, or*
>
> *(ii) the upkeep and management in accordance with the ecological needs of habitats inside and outside European Sites, or*
>
> *(iii) the re-establishment of destroyed biotopes, and*
>
> *(iv) the creation of biotopes.*

Section 11 provides for the establishment of ecological corridors, through the *encouragement* of the Minister for Heritage, including the management of features of the landscape which are of major importance for wild flora and fauna including birds, which include those features which by virtue of —

> (i) their linear and continuous structure, such as rivers or canals with their banks or the traditional systems of marking field boundaries, or
>
> (ii) their function as stepping stones, such as ponds or **small woods**,

Natural regeneration of woodland and native woodland creation might be encouraged by the Minister through the Forestry Programme and other measures, to act as small wood 'stepping stones' and to provide greater levels of ecological coherence between European sites, NHAs, and other sites of high ecological value.

Section 15 provides for the designation of nature reserves on lands owned by the Minister or by the State. This includes lands which would serve the objectives of the Birds Directive, including lands with a (i) linear and continuous structure, such as rivers or canals with their banks or the traditional systems of marking field boundaries, and lands which (ii) function as stepping stones,

such as ponds or small woods. Section 16 provides for the recognition of privately owned lands as nature reserves (on the application of the private landowner).

Section 17 provides for the designation of land as a refuge for fauna or flora or both, where the land is, or is contiguous to, a habitat of the species or has features of the landscape which are of major importance for wild flora and fauna, including birds, due for example to their (i) linear and continuous structure, such as rivers or canals with their banks or the traditional systems of marking field boundaries, and lands which (ii) function as stepping stones, such as ponds or small woods. Any proposed designation order shall include the protective measures proposed to be applied to the refuge to protect the habitat requirements for the fauna and flora. The designation of privately owned land as a refuge may attract compensation to the landowner in certain circumstances.

Section 18 makes provision for land management agreements, to ensure that land is managed to not impair wildlife or its conservation. The agreement may provide for payment to the landowner, and for the agreement to be enforceable against successors in title to the land. Any such agreement requires prior notice to the Commissioners of the Office of Public Works, Minister for Agriculture Fisheries and the Marine, and any planning authority within whose area the land is situated. Section 18(7) clarifies that "management" in this context includes the use of land for agriculture or forestry, the making of any change in the physical, topographical, or ecological nature or characteristics of the land and the use of the land for educational or recreational purposes. The landowner may be eligible for compensation or other remuneration for any agreement made in accordance with this section.

There is, accordingly, huge potential to harness the provisions of the Wildlife Acts to encourage native woodland creation and similar schemes in a manner consistent with the objective of creating ecological corridors and stepping stones, which is also consistent with Article 10 of the Habitats Directive.

6 Habitats Directive - AA Screening

6.1 Key Points

There must be a system of authorisation which guarantees that projects likely to have a significant effect on a European site do not proceed without the necessary assessment under Article 6(3). Appropriate Assessment (AA) is required of any plan or programme *likely to have a significant effect* on the conservation objectives of a site which has been designated or is designated in future. Consequently, AA screening is concerned with likely significant effects.

The Minister may not licence a project without an AA Screening unless the Minister is certain that likely significant effects on a European site can be ruled out, based on objective scientific information.

The profound impact of Case C-323/17 People over Wind on the AA Screening procedures in the Forestry Sector is described in the Regulatory Review Report. New procedures introduced in 2019 directed DAFM Inspectors to treat the following as 'mitigation' to be disregarded in AA Screening:

(i) compliance with the Environmental guidelines, requirements, and standards, and
(ii) any specific safeguards detailed in the application itself.

The European Commission Methodological guidance on Article 6(3) and (4) of the Habitats Directive provides that a generic component of a project can be considered in the AA Screening, such as Best Available Technologies, statutory 'no go' zones, and pre-emptive measures prescribed in Regulations, Natura 2000 management plans and/or spatial / zoning plans.

For example, the Minister, in determining any application under the Forestry Act 2014, is obliged to follow good forest practice, and to have regard to the social, economic, and environmental functions of forestry, which would include any functions forestry serves under the RBMP programme of measures. The RBMP sets out measures to avoid or minimise uncontrolled discharges to waters, including measures specifically related to forestry. In addition to the RBMP measures:

- The Minister may not grant approval for a project unless he is satisfied that the necessary measures are in place to prevent deterioration of a water body - Case C-461/13 *Weser*
- SI 113/2022 prescribes mandatory measures to avoid or reduce the potential for discharges of nitrates to surface waters from certain agricultural activities.
- SI 291/2013 requires 'preventative measures' to be taken to prevent materials/equipment/machinery/vehicles falling into excavations or water.

In AA Screening, according to the EC Guidance, it should be permissible to take account of measures which are:

- *prescribed* by regulations, spatial or zoning plans, Natura 2000 management plans, or best available technologies (BAT),
- not plan- or project- specific, but generic,
- identified and described as such in the project description.

Recommendations 1 and 2 in the Regulatory Review Report take account of the reasoning of the CJEU in Case C-323/17, and the European Commission in the EC Methodological Guidance, and

provides that generic mandatory water set-backs should assessed (AA/SEA), subject to effective public consultation, and their effectiveness in certain site conditions should be determined prior to adoption in binding regulations or statutory guidelines. Such set-backs (or 'no go' zones) would be binding and enforceable against all licensees unless the licence expressly provides otherwise.

The difficulties identified by the CJEU in Case C-323/17 would therefore be overcome as follows:

- the AA Screening would allow for a full and precise analysis of the protective measures capable of avoiding or reducing any significant effects under certain assumed conditions;

- DAFM would not be relying on the protective measures without a full and precise analysis of their capability or effectiveness, and would not therefore deprive the Habitats Directive of its purpose or could circumvent its essential safeguarding role;

- DAFM would not be relying on the protective measures without a full and precise analysis of their capability or effectiveness. The AA of the generic mandatory measures would be a full and precise analysis of their effectiveness in certain assumed conditions. The AA Screening of the proposed project would consider whether there are any site specific reasons why the AA conclusions could not be relied upon to screen out likely significant effects on a European site. This approach would not result in *lacunae* or gaps and would result in complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned.

- There would be no absence of an AA, and there would be a proper assessment of the impact and effectiveness of those measures in protecting the European site.

- Members of the public would not be deprived of their right to participate in the environmental decision-making procedure, as they would be consulted prior to the adoption of the generic mandatory measures, and they would be consulted on the individual licence application on a project-specific basis.

The Minister cannot remove all reasonable scientific doubt as to the effects of proposed works on a specific European site without a site-specific AA Screening. However, when carrying out site-specific AA Screening, this approach would permit the Minister to take account of the generic mandatory measures that have already been the subject of a prior AA and public participation, and their effectiveness in certain conditions will have been ascertained before the individual licence application is made.

The EC Methodological Guidance refers to 'no go' zones as an appropriate type of measure to treat in this manner. For that reason, Recommendations 1-2 in the Regulatory Review Report focus on water setbacks.

6.2 Article 6(3) of the Habitats Directive

The full text of Article 6(3) of the Habitats Directive is as follows:

> *3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having*

ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Recital 10 of the Habitats Directive provides that an Appropriate Assessment (AA) is required of any plan or programme *likely to have a significant effect* on the conservation objectives of a site which has been designated or is designated in future.

Consequently, AA screening is concerned with likely significant effects. In fact, in Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment and Others* ('Dutch Nitrates') the CJEU held that the *starting point* in determining whether something is subject to Article 6(3) is *whether it is likely to have a significant effect on a European site*.

If there is no likely significant effect on a European site, the project 'screens out' as Article 6(3) is not applicable. The key point, however, is that it is necessary to check. The process of checking is referred to in this Report as 'AA Screening'.

6.3 Case law on what is meant by 'likely'

In Case C-258/11 *Sweetman and Others*[58] the Advocate General observed that 'likely' is closer to 'possibility' than 'probability'. The effect does not need to be established; it is merely necessary to determine that there *may be* such an effect[59].

In Case C-127/02 *Waddensee*[60], the CJEU held that likely significant effects cannot be screened out where *"it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned".* For an effect not to be considered likely, there must be no *reasonable scientific doubt* remaining as to the absence of such significant effect.

Likelihood is determined by the specific characteristics of the proposed project, including all its aspects, which can either by themselves or in combination with other plans or projects, affect the conservation objectives of a European site[61].

Even a small-scale project is likely to have a significant effect on the environment if it is in a location where the environmental factors, such as fauna and flora, soil, water, climate, or cultural heritage, are sensitive to the slightest alteration[62]. The same is true of sensitive European sites.

Because 'likely' depends on a case-by-case assessment, it is challenging to exclude, or 'screen out', in advance, a whole class of project or activity based on an assumption that there is no likelihood of significant effects on a European site arising from such project or activity.

(a) Joined Cases C-293/17 and C-294/17 ('Dutch Nitrates')

The CJEU held that Article 6(3) precludes legislation which would allow a category of project (e.g., the application of fertilisers and the grazing of cattle within or in the vicinity of a European site) to be implemented without a permit or an individual assessment of its implications for the European sites concerned. The CJEU held: "*unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites, which it is for the referring court to ascertain."*

(b) Case C-98/03 *Commission v Germany*[63]

The Advocate General noted that agriculture, forestry, and fisheries activities were excluded from the definition of 'project' and therefore exempt from a requirement for a licence or authorisation. The activities were subject to legally binding rules and best practice guidance in respect of nature protection and protecting the countryside, however the CJEU found that these standards/requirements were too general to guarantee the necessary level of protection for

European sites. The Advocate General determined that Article 6(3) is not applicable only where there is *no possibility* of a significant effect on a European site.

The Advocate General's Opinion states:

> *38. In my view it is clearly impossible to presume in a general and abstract way, as the German legislation does, that certain predetermined categories of activities or interventions will never produce such an effect. The impact of a project is relative, varying according to the nature and characteristics of the project in question, the site and the species concerned, and it must therefore be assessed case by case. For example, small habitats containing unusual and particularly delicate species may react much more sharply than other less 'sensitive' protected sites to a given type of external influence. I consider that this interpretation is also entirely consistent with the priority accorded by the Directive to the conservation of protected sites and the protection of threatened species.*

And:

> *40. These shortcomings in the provisions transposing the Directive are not, in my view, remedied by the fact, mentioned by the German Government, that projects which are not subject to assessment must in any case… observe the principles and rules on the environment, conservation of nature and care of the landscape, which it is claimed satisfies, albeit indirectly, the requirements with regard to conservation of sites and impact assessment laid down in Article 6(3) and (4) of the Habitats directive. I do not think a reference to general rules or 'good professional practice' can guarantee the necessary level of specificity, precision and clarity in the transposition of directives required in accordance with settled Community case-law.* (emphasis added)

The judgment of the CJEU follows the Advocate General's opinion.

(c) Case C-538/09 *Commission v Belgium*

The CJEU concluded that it is not possible to predict, at the level of principle, all possible significant effects of a plan or project, individually and in combination with other plans and projects, on a European site. Certain installations and activities were classified as low risk (Class 3) following an environmental assessment, with other, more risky installations and activities classified as medium risk (Class 2) and high risk (Class 1). Class 3 installations and activities did not require an authorisation or permit. Instead, they were subject to a prior notice / declaration procedure, and the carrying out of a Class 3 installation or activity was subject to binding rules and conditions. Despite these precautions, the CJEU was not satisfied that activities under Class 3, which included the provision of accommodation for bovine stock, bulk storage of animal feedstuff, and water treatment installations, all subject to maxima / limitations, could cause deterioration in water quality, with significant implications for European sites.

The CJEU held that, for activities and installations to be excluded from any requirement for individual AA screening through such a measure, it must be certain that likely significant effects are excluded. Since AA screening must be conducted in the light, inter alia, "of the characteristics and specific environmental conditions of the site concerned by that plan or project." (Case C-127/02, Waddenzee), the CJEU held that was not possible to do this with a whole class of exempted installations and activities.

Projects and activities cannot be systematically exempt from the AA screening / authorisation requirements solely on the basis, for example, that they are below a certain budgetary or scale threshold, or that they will meet certain criteria or comply with generally binding rules which do not adequately exclude likely significant effects on all European sites.

(d) Case C-241/08 *Commission v France*[64]

Even where the exempted works / projects are for the purposes of conserving or restoring lands and habitats, a systematic exemption of such works from the AA screening/authorisation requirements was found to be incompatible with Article 6(3).

6.4 Case law on what is meant by 'significant effects'

In Case C-258/11 *Sweetman and Others,* the Advocate General described 'significant' as a de minimis threshold, to exclude plans and projects that have no appreciable effect on a European site: "*If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill*".

The Advocate General continued: "*The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site".*

In *Heather Hill Management Company clg*[65] the High Court quoted from these passages and from the Advocate General Kokott's opinion in Case C-127/02 *Waddensee*, that '*it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment'*

6.5 Case law on concept of individual or in combination significant effects

Individually a project or activity may have no significant effect on a European site, but it may combine with other projects or activities to contribute to significant effects on the European site concerned. In combination assessments are particularly challenging at AA screening stage for an individual project, as the AA screening will likely be constrained by the availability of relevant data.

As the CJEU noted, in joined **Cases C-293/17 and C-294/17** ('Dutch Nitrates'):

> *96. In that regard, as the Advocate General noted in points 42 to 44 of her Opinion, an overall evaluation of the implications carried out in advance, such as that conducted when the PAS was adopted, makes it possible to examine the cumulative effects of different sources of nitrogen deposition on the sites concerned.*
>
> *97. The fact that an assessment at such a level of generality makes it possible to examine better the cumulative effects of various projects does not mean, however, that national legislation such as that at issue in the main proceedings necessarily meets all the requirements stemming from Article 6(3) of the Habitats Directive.*

The CJEU's point is that a programmatic level AA, conducted in advance of any individual projects, may make cumulative assessment easier and more robust, but it will not necessarily comply with the Article 6(3) requirements in other respects.

6.6 The concept of a 'plan'

AA screening, and possibly AA, is required of any 'plan' under the Strategic Environmental Assessment (SEA) Directive, any plan as defined in the EC (Birds and Natural Habitats) Regulations, and any plan that is likely to have significant effects on a European site. A plan that is subject to adoption or approval by the Minister under the Forestry Act would constitute a 'plan' for the purposes of Article 6(3).

6.7 Concept of a 'project'

AA screening, and possibly AA, is required of any 'project' as defined under the Environmental Impact Assessment (EIA) Directive[66]. In Case C-254/19, *Friends of the Irish Environment* the CJEU confirmed that it is not necessary for something to be a 'project' under Article 2(1) of the EIA Directive for it to be a 'project' for the purposes of Article 6(3).

An activity that is likely to have a significant effect on a European site will constitute a 'project'. Cattle grazing and the application of fertilizer were deemed by the CJEU to be a 'project' under Article 6(3) where those activities were carried on within Natura 2000 sites sensitive to those impacts[67]. Each individual occurrence of a regular or routine activity can either form part of a single continuous 'project' or separate individual 'projects' for the purposes of Article 6(3), and depending on the particular factual circumstances[68].

Joined Cases C-473/19 and C-474/19 (Swedish Logging) and Case C-441/17 *Commission v Poland* (Białowieża Forest) establish that the CJEU considers that all forms of felling, thinning, clear-felling, removals and other physical interventions in the forest environment are projects, where they are likely to have a significant effect on a European site.

A 'project' is defined under the EC (Birds and Natural Habitats) Regulations (which apply to decisions made under the Forestry Act 2014), as:

> *(a) land use or infrastructural developments, including any development of land or on land,*
>
> *(b) the extraction or exploitation of mineral resources, prospecting for mineral resources, turf cutting, or the exploitation of renewable energy resources, and*
>
> *(c) any other land use activities,*
>
> *that are to be considered for adoption, execution, authorisation or approval, including the revision, review, renewal or extension of the expiry date of previous approvals, by a public authority and, notwithstanding the generality of the preceding, includes any project referred to at subparagraphs (a), (b) or (c) to which the exercise of statutory power in favour of that project or any approval sought for that project under any of the enactments set out in the Second Schedule of these Regulations applies;*

The EC (Birds and Natural Habitats) Regulations also define an 'activity' as:

> *as any operation or activity likely to impact on the physical environment or on wild flora or fauna or on the habitats of wild flora and fauna, other than—*
>
> *(a) development requiring permission under Part 111 of the Planning and Development Act 2000 as amended,*
>
> *(b) activities requiring the consent of the Minister for Agriculture, Fisheries and Food, under the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011,*
>
> *(c) activities to which the exercise of statutory power in favour of that activity, pursuant to Regulations made under the Act of 1972 or under any of the enactments set out in the Second Schedule of these Regulations, applies, or*
>
> *(d) activities for which, under the Act of 1972, the function of giving or refusing consent for an activity, or deciding on its own behalf to carry out any activity, is assigned to a public*

authority and the activity is carried out with and in compliance with a consent given under the applicable regulations;

An 'activity requiring consent' is defined as

'*any activity that has, before the commencement date of these Regulations, been notified pursuant to Regulation 4(3)(b) of the European Communities (Natural Habitats) Regulations 1997, any activity listed in Regulations made under the Act of 1972 for the purpose of designating a site as a special protection area or as a special area of conservation, and any activity in relation to which the Minister has given a Direction pursuant to Regulation 28 of these Regulations, as being an activity that requires the approval of the Minister or is covered by the consent of a public authority*'.

Each Statutory Instrument designating a European site includes a list of activities requiring consent due to the risk of significant effects on the conservation objectives of the European site concerned.

6.8 Consent or Authorisation Procedure

The High Court in *Friends of the Irish Environment (peat exemption)* held that it is implicit from Article 6(3) that projects which are likely to have a significant effect must be subject to *a form of* development consent[69]. Case C-538/09, Commission v. Belgium established that systematic exemption from Article 6(3) is not permissible. In Joined Cases C-293/17 and C-294/17 (Dutch Nitrates) the CJEU considered that it would only be possible to exempt certain types of activity from a requirement for an authorisation and prior AA or screening for AA, where it has been established beyond a reasonable scientific doubt that: *"the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites".*

There must be a system of authorisation which guarantees that projects likely to have a significant effect on a European site do not proceed without the necessary assessment under Article 6(3).

6.9 AA Screening under the EC (Birds and Natural Habitats) Regulations

Regulation 42(1) provides that AA Screening shall be carried out, and Regulation 42(2) provides that AA Screening must be carried out prior to the consent or authorisation for the project to proceed.

The legal test to be applied to each screening determination is as follows:

- Regulation 42(6) provides that AA is required where it cannot be excluded that the proposed plan or project would not have a significant effect on a European site.

- Regulation 42(7) provides that AA is not required where it can be excluded that the proposed plan or project would not have a significant effect on a European site.

These provisions, which reflect CJEU case law, ensure that any reasonable scientific doubt remaining as to the absence of significant effects on the European site, whether based on uncertainties as to the completeness or adequacy of the AA screening report or any other lacuna or gap in the available information or analysis, should lead to a determination under Regulation 42(6) that an AA is required.

Sub-paragraph (17)(b) provides that the necessary surveys for the purposes of AA Screening must be carried out *before* consent is given.

Sub-paragraph (18)(a) provides that the initial AA Screening determination shall be notified to the public together with the reasons for each such determination, as soon as possible after the making of the determination, and shall also make the determination or notice available in electronic form including placing the documents on the competent authority's website.

Sub-paragraph (20) provides that when carrying out AA Screening there is an obligation to consider cumulative impacts with developments the subject of planning permissions or applications under the 2000 Act.

Sub-paragraph (22) confirms that it is not possible to obtain permission or consent by default, whether through the expiration of a decision-making deadline or otherwise.

Sub-paragraph (24) provides that the AA Screening shall assess the impact of the proposed plan or *project on each of the European sites likely to be affected*.

Sub-paragraph (21) deals with the situation where there is more than one public authority involved in the granting of necessary consents and the carrying out of AA Screening. The second and subsequent authority may take account of the AA Screening or AA (or both) already undertaken, having regard to the extent to which the scope of the first assessment covered the issues that would be required to be addressed in the second consent procedure. The second or subsequent authority may limit the amount of information it requests in this regard. Alternatively, two or more authorities may assess the proposed plan or project on a joint basis, or one of the two may take a lead in the process.

6.10 AA under the EC (Birds and Natural Habitats) Regulations

Regulation 42(3) makes it clear that the Minister may at any time in the procedure request the submission of a Natura Impact Statement (NIS) for the purposes of carrying out or completing an AA, and any other information that may be required. A failure on the part of the licence applicant to provide it shall result in the application being deemed as withdrawn (Regulation 42(4)).

The required contents of NIS are specified in Regulation 42(5). Sub-paragraph (8) sets out public notification requirements where it is determined that AA is required, and that a NIS should be submitted.

Sub-paragraph (13), inserted by SI 293 of 2021, provides:

> "Where a public authority has determined, *pursuant to paragraph (6)*, that an Appropriate Assessment is required in respect of a proposed plan or project, and before making a determination on the matter pursuant to paragraph (11), the public authority shall carry out a public consultation and publish a notice of the proposed plan or project in a manner to be determined by the public authority"

This inserts a new public consultation procedure *after* the AA Screening, but only where a determination has been made that AA is required (i.e., where the project "screens in"). It applies to forestry and all other sectors covered by the EC (Birds and Habitats) Regulations.

Sub-paragraph (11) provides that the AA shall include an express determination that the proposed plan or project *would not adversely affect the integrity of a European site*. Sub-paragraph (12) outlines the matters to which DAFM shall have regard in carrying out the AA.

SI 293 of 2021 requires the public consultation to continue for a period of no less than 30 days.

Sub-paragraph (16) sets out the test to be determined in the AA procedure – the outcome which Article 6(3) is intended to reach: whether the proposed plan or project would adversely affect the integrity of a European site. Consent may only be granted for the plan or project where it would not adversely affect the integrity of the site.

Sub-paragraph (17)(a) provides that consent may be granted subject to modifications so long as those modifications have been assessed.

Sub-paragraph (17)(b) provides that the necessary surveys for the purposes of AA must be carried out *before* consent is given.

Sub-paragraph (18)(a) provides that the AA determination, shall be notified to the public together with the reasons for each such determination, as soon as possible after the making of the determination, and shall also make the determination or notice available in electronic form including placing the documents on the competent authority's website.

Under sub-paragraph (19), the Minister for Heritage may require a public authority to carry out AA.

Sub-paragraph (20) clarifies that, when carrying out AA, there is an obligation to consider cumulative impacts with developments the subject of planning permissions or applications under the 2000 Act.

Sub-paragraph (22) confirms that it is not possible to obtain permission or consent by default, whether through the expiration of a decision-making deadline or otherwise.

Sub-paragraph (24) provides that the AA shall assess the impact of the proposed plan or *project on each of the European sites likely to be affected*.

Sub-paragraph (21) deals with the situation where there is more than one public authority involved in the granting of necessary consents and the carrying out of AA Screening or AA. The second and subsequent authority may take account of the AA Screening or AA (or both) already undertaken, having regard to the extent to which the scope of the first assessment covered the issues that would be required to be addressed in the second consent procedure. The second or subsequent authority may limit the amount of information it requests in this regard. Alternatively, two or more authorities may assess the proposed plan or project on a joint basis, or one of the two may take a lead in the process.

These provisions accurately represent the requirements of Article 6(3) as interpreted by the CJEU in its rulings to date.

6.11 Overlapping AA Provisions in the Forestry Regulations 2017

The EC (Birds and Natural Habitats) Regulations apply to decisions, plans and activities under the Forestry Act 2014. There is no need to have a second, parallel set of AA procedures in the Forestry Regulations (SI 31/2020, as amended).

The following table highlights some of the issues with this parallel regime.

Forestry Regulations 2017, as amended	Habitats Regulations 2011 as amended
Regulation 19(4): in carrying out AA the Minister shall take certain matters into account, including *if appropriate,* any written	The Habitats Regulations *requires* public participation in the AA procedure, and that the

submissions or observations made in accordance with a public consultation procedure conducted under Part 6 of the Forestry Act.	Minister shall take any submissions or observations into account.
Where a proposed project has been screened for AA and a determination reached of no likely significant effects on any European site, Regulation 19(5) permits a condition to be attached to the licence, where that condition does not seek to protect the integrity of a European site.	No equivalent provision in Habitats Regulations. See discussion on evolving legal position with respect to mitigation and conditions, at Section 7.5 of this report. [xiv]
Regulation 19(8) appears to suggest that its requirements may be waived where an application submits an EIAR, or where other sources of information are available, and the AA information is readily identifiable in the EIAR.	There is no equivalent provision in the Habitats Regulations. The EIA Directive provides for co-ordinated procedures for EIA and other assessments under other EU Directives, but co-ordinated measures do not permit the waiver of essential obligations under the Habitats Directive. The reference in Regulation 19(8) to "*other relevant sources*" is vague and unclear how it aligns with effective public participation procedures.

6.12 C-323/17 *People over Wind v Coillte* and AA Screening

6.12.1 Factual Context

The case relates to a wind farm project. The developer, Coillte, obtained a grant of planning permission for a wind farm which included as a binding condition that it should submit a Construction Management Plan (CMP) which would provide details of the means by which Coillte or its contractors would ensure that the surface water run-off from the proposed development is controlled such that no silt or other pollutants would enter watercourse.

The grant of permission for the wind farm did not authorise the connection of the wind farm to the grid. Therefore, at the time of the principal authorisation for the wind farm project, there was no authorisation for the grid connection. The outcome to be achieved by Coillte in implementing the planning condition was clear – no discharges to the watercourse – but the precise means of achieving that outcome had not been assessed or permitted at that initial planning decision stage.

There was the potential that the grid connection works might fall within a class of exempted development, such that no planning permission would be required, but subject to the works being 'screened out' for Appropriate Assessment. Therefore, depending on the outcome of the AA Screening procedure, the construction works for the grid connection would either require a further grant of planning permission (and Article 6(3) Appropriate Assessment), or it would be 'exempted development' for which no planning permission or AA would be required. A determination that there was a likelihood of significant effects, or that significant effects could not be excluded, would also

[xiv] In *Elaine Kelly Dunne* [2019] IEHC 328, the Court quashed an AA screening which was concluded on the basis of mitigation measures and permit conditions.

determine whether planning permission would be required and whether the public would have a right to participate.

Coillte was both the project promotor and the 'public authority' with responsibility under SI.477/2011 for carrying out the AA Screening of its own plan or project. Coillte engaged external consultants to carry out the screening exercise, but ultimately it was Coillte who made the AA screening determination on its own project. [xv]

The intention was to install the grid connection under the watercourse using directional drilling techniques to cross rivers along the proposed route. The AA Screening report stated that *in the absence of protective measures* there is *potential* for the release of suspended solids into waterbodies along the proposed route, and that if construction was to result in the release of silt or pollutants such as concrete into a watercourse which could reach the Nore pearl mussel population of the river area via smaller streams or rivers, there *would be* a negative impact on the Nore pearl mussel population.

The assessment of the risk or likelihood of significant effects must, according to the CJEU, be made in the light of *the characteristics and specific environmental conditions of the site concerned* It was clear, therefore, that the AA Screening report identified a source of pollutant, a pathway, and a potential for a significant effect on the habitat of a priority species that is particularly vulnerable to the type of emission from the project.

The sensitivity and vulnerability of the Nore pearl mussel would have reinforced the source-pathway-receptor linkage.

The AA Screening report also analysed the 'protective measures' set out in the CMP and concluded that, based on the distance between the works and the watercourses and the measures set out in the CMP, there would be no likely significant effects on any European site.

6.12.2 The Ruling in Case C-323/17

The CJEU found that the "*protective"* (also, "mitigation") measures must be understood as *measures that are intended* by the developer to *avoid or reduce* the harmful effects of the envisaged project on the site concerned.

The CJEU held that the obligation to carry out Article 6(3) AA is dependent on two conditions: that the plan or project is *not* connected with or necessary to the management of a European site, and that the plan or project is *likely to have a significant effect* on the site.

The referring Court was of the view that the first condition had been met. As for the second condition, the case law of the CJEU had established that such a risk exists if it cannot be excluded based on objective information that the plan or project will have a significant effect on the site concerned. The CJEU held that measures intended to avoid or reduce the harmful effect (sedimentation etc) were taken into consideration in the AA screening report when determining whether it is necessary to carry out an AA, which presupposes that it is likely that the site is affected significantly, and consequently that an AA should be carried out.

The assessment cannot have lacunae and must contain complete, precise, and definitive findings and conclusions *capable* of removing all reasonable scientific doubt as to the effects of the plan or project on the European site concerned.

[xv] SI 477/2011 provides for public authorities to carry out AA Screening of their own plans prior to adoption, therefore the circumstances in this case were not unusual in that respect. The Judgment of the CJEU expressly records that the AA Screening Report was prepared by third party consultants, although the AA Screening 'recommendation' was made to the developer by its own programme manager.

A full and precise analysis of the measures *capable* of avoiding or reducing any significant effects on the site concerned must be carried out, not at the screening stage, but specifically at the stage of the Article 6(3) AA procedure. (paragraph 36).

The CJEU concluded that it is not appropriate at screening stage of the Article 6(3) procedure, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.

6.12.3 The Reasoning in Case C-323/17

The original question posed by the referring Court did not actually use the word 'intention'. The question posed was:

> *Whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under Article 6(3) of the Habitats Directive?*[xvi]

It was the CJEU that re-framed the question as follows:

> *Whether Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether or not it is necessary to carry out subsequently an appropriate assessment of a project's implications for a site concerned, it is possible, at the screening stage, to take account of the measures* ***intended to avoid or reduce*** *the project's harmful effects on that site.*[xvii]

The CJEU's reasoning is set out in paragraphs 37 – 39 of the judgment, and is summarised here for convenience as follows:

- Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and of the assessment stage, which acts as an essential safeguard provided by the Directive.
- Otherwise, there would be a risk of circumvention of the objectives and purpose of the Habitats Directive.
- It is only through the Article 6(3) procedure that the public would have a right to participate prior to the adoption of the decision which would permit the plan or project to be pursued.
- Otherwise, the developer could proceed with the works, without any assessment of the measures capable of dispelling any doubts as to their effectiveness in avoiding impacts.

6.13 How Case C-323/17 has been applied in the Irish Courts

Case C-323/17 *People over Wind* has been considered by the Irish High Court in at least the following judgments:

- *Eoin Kelly v. An Bord Pleanála* [2019] IEHC 84 (Unreported, High Court, Barniville J., 8th February, 2019)
- *Elaine Kelly Dunne & Others v Offaly Co Council & Others* [2019] IEHC 328, (Unreported, High Court, O'Regan J, 21st May 2019

[xvi] Quoted at paragraph 22 of judgment in C-323/17
[xvii] See paragraph 27 of judgment in C-323/17. Notably, it was the CJEU that introduced "avoidance" measures into the analysis.

- *Heather Hill Management Company CLG (No.1) v. An Bord Pleanála* [2019] IEHC 450 (Unreported, High Court, Simons J., 21st June, 2019)

- *Uí Mhuirnín v. Minister for Housing, Planning and Local Government* [2019] IEHC 824 (Unreported, High Court, Quinn J., 5th December, 2019)

- *Sweetman v. An Bord Pleanála (IGP Solar)* [2020] IEHC 39 (Unreported, High Court, McDonald J., 31st January, 2020)

- *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622 (Unreported, High Court, McDonald J., 2nd December, 2020)

- *Eco Advocacy Clg v An Bord Pleanála & Others (No.1)* [2021] IEHC 265 (Unreported, High Court, Humphreys J, 27th May 2021)

- *Eco Advocacy Clg v An Bord Pleanála & Others (No.2)* [2021] IEHC 610 (Unreported, High Court, Humphreys J, 4th October 2021)

- *Heather Hill Management Company clg (No.2) v An Bord Pleanála and Others* [2022] IEHC 146, (Unreported, High Court, Holland J, 16 March 2022)

6.13.1 *Eoin Kelly* [2019] IEHC 84

In *Eoin Kelly*, the development involved a proposed supermarket development at a site that was separated from the River Nanny Estuary and Shore SPA (Site Code 004158) by a two-lane roadway. The site would also be connected to the local authority storm and foul water systems, which would ultimately discharge at the River Boyne beside or close to the Boyne Coast and Estuary SAC (Site Code 001957). The application for planning permission included a standard construction management plan which incorporated details of how the proposed development would comply with the local authority development management standards requiring sustainable urban drainage systems to be incorporated into all new development proposals, in accordance with the County Development Plan. The Applicant in the judicial review procedure contended that, as the planning authority had taken account of the CMP and the associated measures, this constituted an impermissible reliance on mitigation measures in screening out likely significant effects on a European site, contrary to Article 6(3) as interpreted by the CJEU in Case C-323/17 *People over Wind.*

As set out in Chapter 2 of this report, the Water Framework Directive 2000/60/EU requires Member States to take all requisite measures to prevent deterioration in the status of water bodies. The Greater Dublin Drainage Strategy (GDDS) was developed by the Four Dublin Local Authorities and outlines various SUDs techniques for reducing the volume and improving the quality of surface water run-off from construction sites and new developments. The obligation to incorporate SUDs measures, where possible, for all new developments is standard in all County Development Plans and Local Area Plans. The goal of SUDs is to prevent deterioration of water bodies, pursuant to the WFD, but preventing deterioration of water bodies can also have a positive or neutral effect on European sites.

6.13.2 *Heather Hill (No.1) [2019] IEHC 450*

In *Heather Hill* (No.1) there were some distinguishing facts. As in *Eoin Kelly* the development standards contained in the local area plan and the County Development Plan required, for all development sites, a 10m buffer or riparian corridor to be maintained free of construction materials or plant or equipment, either side of any lake, river, or stream. The proposed housing development adjoined the Trusky stream. The County Development Plan also required applicants for permission for development at sites like this to submit an ecological impact assessment report

with the planning application. The Development Plan stated that an ecological impact assessment report is required to ensure that the Planning Authority can meet any obligations under the Habitats Directive (and not specifically Article 6(3) of the Habitats Directive). The ecological impact assessment report submitted by the developer contained a list of measures that the developer would undertake as part of the development, to avoid or reduce the risk of uncontrolled discharges to the stream. This included maintaining the set-back distance provided for under the Development Plan, and other measures that had similar characteristics to those employed by Coillte in the proposed project the subject of the proceedings in Case C-323/17 *People over Wind*. The developer had separately submitted a screening report in accordance with Article 6(3), which concluded that, based on distance, and the effects of tides and dissipation, there was no likely significant effect on any European site in Galway Bay (implicitly due to the lack of a source-pathway-receptor connection).

However, when carrying out screening for Appropriate Assessment, the Inspector appointed by An Bord Pleanála to review the file and make recommendations, expressly referenced the measures contained in the ecological impact assessment report in drawing her conclusion of no likely significant effects on the Galway Bay Natura 2000 sites, in addition to the conclusion on distance and the effects of tides and dissipation on any accidental or uncontrolled discharge to the Trusky Stream. Ultimately the Court decided that the competent authority's reliance on the measures in reaching the screening determination, without establishing objectively or on the basis of evidence that there was no source-pathway connection between the development site and the European sites in Galway Bay, was incompatible with Article 6(3) as interpreted by the CJEU in line with the precautionary principle. It was primarily the *reliance* on the measure in reaching the screening decision that defined its objective intention, and there was no evidence that the measure wasn't needed to interrupt the source-pathway-receptor connection between the development and the European site.

6.13.3 *Eco Advocacy No.1.* [2021] IEHC 265

In *Eco Advocacy No.1.* the housing development was designed and proposed in accordance with the development management standards contained in the County Development Plan. These standards require SUDs measures to be incorporated into the design of all new developments, unless not technically feasible due to site constraints. The most typical measure, as in this case, was the use of an attenuation tank to store surface and stormwater run-off, before being discharged at greenfield rates to a surface water outfall, to a stream some 100m from the site. The stream contributes to the River Boyne. A submission from the Heritage Officer of the Planning Authority noted:

> *"In relation to the Appropriate Assessment the Board should satisfy themselves that the efficacy of the SUDS Strategy and surface water management on the site will have no significant effects on the qualifying interest of any* Natura 2000 *site."*

The summary of the public submissions records:

- *"SuDS should be incorporated.*
- *Attenuation tanks to be properly maintained"*

(The reference to the *efficacy* of the SUDs measures reflects the reasoning of the CJEU in Case C-323/17, in which the CJEU was concerned that the efficacy of the preventative measures incorporated by Coillte had not been established, whether generally or specifically in relation to that site.)

The AA Screening section of the Inspector's report records:

"*Surface water will be directed to three separate but linked attenuation tanks and discharged into an existing stream 100m to the south and controlled to greenfield run off rates*."

The Inspector's report records that this stream discharges to the River Boyne and River Blackwater SAC some 700m downstream, and the River Boyne and River Blackwater SPA some 800m downstream. The Inspector's AA Screening records:

"*The design of the surface water treatment takes into account the scale and nature of the proposed development, i.e. a housing development of moderate size which will be constructed and operated in accordance with standard environmental features associated with a residential development, it is not considered that the proposed development would have potential to have a significant impact on the water quality (and hence various qualifying interests) of the River Boyne and River Blackwater SAC and SPA. The submission from An Taisce refers to the location of the stream which flows into the River Boyne and notes the potential for impact on spawning habitat for trout as well as any potential impact on the European Sites. Trout is not listed as a qualifying interest for the River Boyne and River Blackwater SAC. I do not consider there is potential for any impact on the River Boyne through any hydrological connections via surface, ground and wastewater pathway and therefore no potential for any significant adverse impact, from the proposed development, on the qualifying criteria of River Boyne and River Blackwater SAC*".

The Meath County Development plan incorporates SuDs (2005) as a specific development policy within the county. In line with the Greater Dublin Sustainable Drainage Study (GDSDS), it is a Development Standard within the County Development Plan that all new developments incorporate SUDs measures in their design.

Two NGOs, An Taisce and Client Earth, were permitted to join in the proceedings after the substantive judgment, as *amici curiae* for the purpose of making submissions on the reference to the CJEU.

The Court agreed with the submissions from the NGOs that, when carrying out AA Screening, '*the concept of what is or isn't a 'measure intended to avoid or reduce the harmful effects of the plan or project on [a] site*' should be examined objectively rather than being based on the subjective intent of the decision-maker.

Measures may be described as 'best practice' or 'standard' which, despite not being designed specifically for the proposed plan or project, nonetheless have the effect of avoiding or reducing a significant effect on a European site. The question was whether such measures should be excluded from consideration at the AA Screening stage.

6.13.4 *Eco Advocacy (No.2)* [2021] IEHC 610, (CJEU Reference)

In *Eco Advocacy (No.2)* the High Court has referred the following question to the CJEU for a preliminary ruling:

"Whether art. 6(3) of directive 92/43/EEC is to be interpreted as meaning that, in the application of the principle that in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site, the competent authority *of a member state is entitled to take account of features of the plan or project involving the removal of contaminants that may have the effect of reducing harmful effects on the European site solely on the grounds that those features are not intended as mitigation measures even if they have that effect, and that they would*

have been incorporated in the design as standard features irrespective of any effect on the European site concerned."

The Court proposes that this question should be answered in the affirmative for the following reason:

> "*The protection of the environment must be advanced by objective criteria, and the only objective criterion here is whether the measures have the effect of mitigation, not whether they are intended to do so. Whether the measures are standard or not is also not relevant to this question. The foregoing approach is reinforced by the* precautionary principle*."*

A ruling on the request for a preliminary reference is awaited from the CJEU.

The Court expressly noted that in Case C-323/17, the measures at issue were largely standard SUDs measures, designed to reduce discharges to a nearby watercourse, yet they were considered by the CJEU to be mitigatory.

The same observation can be made about the measures in *Heather Hill (No.1),* as the measures at issue were prescribed by the County Development Plan, to a large extent, and were akin to standard SUDs measures for reducing or avoiding discharges to the stream from the construction site. Yet in *Heather Hill (No.1)*, the Court distinguished the measures at issue from the 'mandatory generic SUDs' measures in *Eoin Kelly*, on the basis that they were specifically incorporated into the project to address issues raised in the ecological risk assessment, to inform the AA Screening.

The decision in *Eco Advocacy (No.2)* highlights the degree of confusion which has arisen in the Irish Courts regarding the precise scope of the judgment in Case C-323/17, and the reference therefore seeks much-needed clarity.

6.14 Impact of Case C-323/17 and case law on forestry licensing

The Regulatory Review Report outlines the impact that Case C-323/17 and some of the domestic case law has had on the forestry licensing system. DAFM adopted revised Standard Operating Procedure for Forestry Inspectors[70] ('SOP') in November 2019 and a Natura Impact Statement Guidance Note and Template[71] (NIS Template) in August 2020. The application of the SOP resulted in an immediate slow-down in processing of licence applications and a backlog emerged as the demand for ecological expertise to carry out AA for most licence applications outstripped the immediately available ecological resources[72].

The revised SOP directed DAFM Inspectors to treat the following as 'mitigation' to be disregarded in AA Screening:

(i) compliance with the Environmental guidelines, requirements, and standards[73], and
(ii) any specific safeguards detailed in the application itself.

Inspectors carry out AA Screening on the precautionary, but artificial, premise that Environmental standards and guidelines would not be applied. Consequently, over 80% of applications now 'screen in' or are referred to DAFM's ecology division for further assessment. A significant number of these applications 'screen in' primarily because it has been necessary to exclude from consideration the application of Environmental guidelines, requirements, and standards.

6.15 EC Methodological guidance on Article 6(3) and (4) of the Habitats Directive

Section 3.1.4 of the European Commission Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC[74] refers to the ruling of the CJEU in Case C-323/17 and states:

However, project developers can sometimes design projects in a way to avoid or minimise potential impacts from the outset. This can be done using best available technologies *or by applying pre-emptive measures, including statutory measures (e.g., no go zones) prescribed e.g., in sector-specific regulations,* Natura 2000 *management plans or in spatial / zoning plans.*

Such generic components of the project can be considered in the screening, contrary to the plan- or project- specific mitigation measures that must not be taken into account at this stage. These components should be clearly identified in the project description. Specific mitigation measures, e.g., construction of green bridges *to allow migration of species for protection of which the site has been designated, particularly if imposed by the competent authority, should only be considered during the appropriate assessment, as described in section 3.2.5.*[xviii]

This Guidance was cited by the High Court in in *Heather Hill (No.2).* In *Friends of the Irish Environment CLG*[75] the Court of Appeal referenced the equivalent EC Guidance on the SEA Directive, and noted that, whilst not binding, it is *"a persuasive authority to which all courts are required to have regard."* On the other hand, in *Monkstown Road Residents' Association*[76] Holland J held with respect to the EU Commission's Guidance on EIA "*Such EU Commission Guidance is not, and does not purport to be binding nor an aid to interpretation of the EIA Directive nor even necessarily the official opinion of the Commission.*"

6.15.1 Generic, mandatory components of a project

The EC Guidance provides an approach which respects both the precautionary principle and the reasoning of the CJEU in Case C-323/17, distinguishing between project-specific safeguards or measures, and generic / mandatory components of projects of the type.

The Minister, in determining any application under the Forestry Act 2014, is obliged by section 11 to follow good forest practice, and to have regard to the social, economic, and environmental functions of forestry, which would include any functions forestry serves under the RBMP programme of measures.

Article 4(1)(a)(i) of the WFD requires Member States to take such steps as are necessary to prevent deterioration to the status of surface water bodies[xix]. The RBMP sets out measures to avoid or minimise uncontrolled discharges to waters, including measures specifically related to forestry.

In addition to the RBMP measures:

- Case C-461/13 *Weser* emphasises that DAFM is precluded from granting permission unless it is satisfied that the necessary measures have been taken to prevent deterioration to the status of a surface water body. The obligation to take account of such measures when assessing proposed projects is embedded in the WFD.

- SI 113/2022 EU (Good Agricultural Practice for Protection of Waters) Regulations 2022, Part 4 (Prevention of Water Pollution from Fertilisers and certain activities) prescribes generally binding rules regarding agricultural activities to avoid or reduce the potential for discharges of nitrates to surface waters. For example, the Regulations require a 10m buffer where the land has an average incline of no greater than 10% towards the water, and cultivation shall not take place within 2m of a water course, except for grassland or grass crops.

[xviii] This reference to Section 3.2.5 in the EC Guidance appears to be a typographical error. It should refer to Section 3.2.4, part of which is quoted above.
[xix] See Chapter 2 of this Report

- SI 291/2013 Safety Health and Welfare at Work (Construction) Regulations 2013 apply to all works, including forestry, and require 'preventative measures' must be taken to ensure that excavating and materials-handling vehicles/machinery do not fall into the excavations or into water.

6.16 Alternative approach to AA Screening of generic, mandatory components

In effect, the EC Methodological Guidance on Article 6(3) and 6(4) indicates that in AA Screening, it should be permissible to take account of measures which are:

- *prescribed* by regulations, spatial or zoning plans, Natura 2000 management plans, or best available technologies (BAT),
- not plan- or project- specific, but generic,
- identified and described as such in the project description.

This is consistent with the CJEU ruling in Case C-323/17 *People over Wind*. The difficulty identified by the CJEU in that case arose from the following factual circumstances:

- the AA Screening did not allow for a full and precise analysis of the protective measures capable of avoiding or reducing any significant effects (para 36).
- relying on the protective measures without a full and precise analysis of their capability or effectiveness would deprive the Habitats Directive of its purpose and could circumvent its essential safeguarding role (para 37).
- relying on the protective measures without a full and precise analysis of their capability or effectiveness could result in *lacunae* or gaps and might not result in complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned (para 38).
- In the absence of an AA, there would be no proper assessment of the impact and effectiveness of those measures in protecting the European site (para 38).
- screening out the likelihood of significant effects based on such protective measures deprived members of the public of their right to participate in the environmental decision-making procedure, as the proposed works constituted 'exempted development' unless AA was required (para 39)[77].

Recommendations 1 and 2 in the Regulatory Review Report take account of the reasoning of the CJEU in Case C-323/17, and the European Commission in the EC Methodological Guidance, and emphasise the following additional safeguards:

- The generic, mandatory measures would be incorporated on a statutory footing, either in a Statutory Instrument or Statutory Guidelines.
- Prior to the adoption of the SI or Guidelines, the Minister would carry out AA Screening and AA of the proposed measures, and SEA screening (and SEA if required), to ensure a proper assessment of the impact and effectiveness of the measures in certain factual conditions.
- The factual conditions on which the AA/SEA/Screening were carried out would be specified.
- There would be public participation on the proposed measures prior to their adoption.
- The measures would be legally binding and enforceable on all licensees, unless the licence provided otherwise.

Such an AA at the level of a Statutory Instrument or Guidelines would not substitute the obligation to carry out AA Screening of a proposed project on a site-specific basis. The rulings of the CJEU make it clear that a competent authority cannot remove all reasonable scientific doubt as to the effects of proposed works on a specific European site without a site-specific AA Screening. However, the purpose of this approach is to ensure that, when carrying out site-specific AA Screening, the competent authority is not obliged to disregard the fact of the generic, mandatory measures, as their effectiveness in certain conditions will have already been assessed and the subject of public participation. The only issue remaining at the AA Screening stage is whether the measures are established to be effective in the site-specific conditions, i.e., that there is no site-specific reason why likely significant effects cannot be excluded.

The EC Methodological Guidance refers to 'no go' zones as an appropriate type of measure to treat in this manner. For that reason, Recommendations 1-2 in the Regulatory Review Report focus on water setbacks.

6.16.1 Seasonal restrictions

There are legally binding restrictions on the cutting of hedgerows to avoid the nesting season for birds. Article 5 of the Birds Directive and Article 12 of the Habitats Directive both require protection of species particularly during the nesting and breeding seasons, when they are most vulnerable to disturbance.

To an extent, therefore, seasonal restrictions on certain works can be viewed as generic, mandatory measures, that are applicable to all projects of a type. However, the EC Methodological Guidance treats seasonal restrictions differently to 'no go' zones.

Langton v Secretary of State for Environment, Food and Rural Affairs and Natural England[78] involved a judicial review challenge to the SSEFRA's Guidance to Natural England*: Licenses to kill or take badgers for the purposes of preventing the spread of bovine TB* (2017). Licenses granted under this Guidance by Natural England restricted / specified the time and place at which culling of badgers could take place. The intention behind such restriction was to reduce the gunfire noise and disturbance impacts on birds in /around SPAs. The High Court in England rejected the proposition that such seasonal restrictions constituted the type of 'protective' measure that could not be considered in AA Screening, according to Case C-323/17. The High Court in England considered that seasonal restrictions are integral features of a project, because they define the time and place of the project. The Court of Appeal had a slightly different view, however by the time the Court of Appeal delivered its judgment, Natural England had altered its AA procedures. The Court of Appeal noted:

> *This ground of appeal has been overtaken by events. New assessments have been made by Natural England. They are included in the relevant part of the HRA template to accord with the judgment of the CJEU in People over Wind. The licences are area-specific and fact-sensitive. In our judgment no ruling of this court would assist in their implementation, a ruling would have no practical utility. We note that Natural England has not changed its ecological assessment of the actual risks posed by disturbance from licensed activity, rather it has responded to the legal ruling.*

The Court of Appeal decision does no more than raise a doubt about seasonal restrictions, however the EC Guidance provides that the *avoidance of works during sensitive periods (e.g., breeding season of species),* is a type of measure which may be best considered as part of the AA, particularly if there is a risk that works outside of those periods could nonetheless significantly disturb a species or its resting places. Case C-357/20 and Case C-477/19, IE *Magistrat der Stadt Wien* ('European hamster' cases) highlighted that breeding and resting places merit protection even after they are vacated, if there is a chance that the species will return to those places again.

Assessing the *effectiveness* of the measure – avoiding a season - may require AA to ensure no reasonable scientific doubt is remaining as to the absence of adverse effects on a European site.

6.17 AA Screening – Competent Experts

Regulation 42(1) of the EC (Birds and Natural Habitats) Regulations provides that AA shall be carried out "*in view of best scientific knowledge*". The High Court held in *Reid v An Bord Pleanála*[79] that, when carrying out AA, An Bord Pleanála must either have or have available to it '*sufficient expertise*' and that '*sufficient expertise*' in this context must mean: "*firstly, an expertise to be able to fully understand and properly evaluate the developer's fact-specific material and the science underlying it; and secondly, to do so in the context of expert knowledge of prevailing general standards and scientific information.*"

> "*The notion of relying on other people's judgements more generally is flawed and, if it were to be applied, would be an abdication of the board's independent statutory role. Indeed it is a circular argument - how can the board know that the developer's advisers are in fact competent experts that can be relied on if the board doesn't itself have, or have access to, equal competence and expert knowledge. The logic that "other people have looked at this, therefore it must be OK" is the sort of thing that leads to systems failures. It is the stuff of Challenger, Columbia, Grenfell Tower, pre-crash financial regulation. I don't accept that the board would be complying with its critically important independent evaluative obligations if it took that approach, although I emphasise that I say that in the context of endeavouring to clarify the board's obligations. I'm not finding that the board did take that approach here*."

There is no 'competency' requirement at AA Screening stage. The AA Screening must, however, be based on objective scientific information. The decision-maker should have access to relevant competence where necessary.

DAFM Inspectors carry out the initial AA Screening and refer the file to the ecology section where a reasonable doubt remains as to the absence of significant effects on a European site. Competent experts with the requisite technical and scientific knowledge are required at the AA stage. In *Reid*, the Court held:

> "*46. The matters to be considered in deciding whether there is reasonable scientific doubt involve looking in particular at:*
>
> *(i). the source of environmental impact;*
> *(ii). the pathway between source and receptor;*
> *(iii). the receptor, that is the habitat, flora or fauna being affected; and*
> *(iv). the degree of impact thereby created.*
>
> *47. Each of these steps, in terms of source – pathway – receptor – impact, involve two dimensions. Firstly, a fact-specific examination, such as, where are the flora and fauna concerned, where would the wind carry any air emissions, in what direction and to what extent. And secondly, measuring those fact-specific matters against general scientific standards which would include for example the degree of impact that is regarded as being acceptable and that would not produce an adverse effect on the integrity of a European site.*"

A question arose as to whether the Inspector appointed by An Bord Pleanála to review the application and prepare a report with recommendations for the Board had the requisite competence to assess the application and its implications for a European site. The Court held:

"Likewise, the board's argument that it "doesn't have infinite resources" is facile and hollow. Developers don't have infinite resources either, yet they manage to assemble teams of experts to deal with all technical issues. The board must have a corresponding level of expertise on each of the areas so dealt with. But I emphasise that just because the board argued for an unacceptably low standard doesn't mean it isn't in a position to comply with a higher standard. Decision-makers sometimes like a safety net in legal terms, but I'm afraid here it isn't available. Sufficient expertise means fully understanding the developer's material in all its aspects. Green-lighting something you don't fully understand wouldn't be an acceptable procedure, if it were to happen."

7 Habitats Directive – AA Procedures

7.1 Key Points

Article 6(3) requires a competent authority, such as the Minister when licensing forestry applications, to be certain beyond any reasonable scientific doubt, that the proposed project will not adversely affect the integrity of a European site.

This means that the Minister must be certain that the habitats and species for which the site is designated will not be harmed by the proposed project. Such harm could potentially occur within the boundary of a European site, or ex situ.

The AA should assess all aspects of the proposed project, including all proposed mitigation or protection measures to avoid or reduce adverse impacts. The effectiveness of the protective measures must be certain at the time the decision is made that the project can proceed.

A project cannot be authorised based on assumptions that measures to avoid or reduce an adverse impact will be effective. This must be established at the outset. Reliance on potential future benefits, such as replacement habitat/ habitat enhancement, can only occur where such benefits are certain to occur.

The 'Dutch Nitrates' case considered an adaptive management approach to AA and rejected it as insufficiently certain. An adaptive management approach involves the approval of incremental projects, with continuous monitoring, assessment, and adjustment, to minimise the risk of harm. The CJEU held that such an approach to AA lacks the requisite certainty to guarantee no adverse impacts on site integrity.

7.2 Purpose of AA Procedure

Where a plan, project, or activity, is likely to have a significant effect on one or more European sites, Article 6(3) requires that the competent authority carry out an Appropriate Assessment (AA) of the implications for the site concerned.

In **Case C-411/17** *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*[80] the CJEU held that Article 6(3) establishes a procedure intended to ensure that a project is authorised only to the extent that it will not adversely affect the integrity of a European site. The AA procedure occurs before authorisation is granted.

An application for afforestation, felling, or a forest road, which is considered likely to have a significant effect on a European site (or where such effect cannot be excluded in the AA Screening process), is referred to the specialist ecology section of the Forestry Division of DAFM. AA is a scientific analysis which must be based on best available knowledge in the field. Best available knowledge changes over time, which emphasises the need for continuous training and development within the Department.

7.3 Adverse effect on site integrity

The concept of site integrity is linked to the presence of a habitat type or species whose preservation and protection was the reason the European site was designated. The Member State must maintain and preserve the habitat or species at a favourable conservation status[81].

In **Case C-164/17** *Grace and Sweetman* the proposed windfarm project would be located within the boundary of an SPA. The conservation objectives for the SPA included a requirement to maintain or restore favourable conservation conditions for the hen harrier. This entailed providing suitable habitat, including foraging areas within the SPA. A hen harrier habitat management plan was submitted with the planning application. It included proposed safeguards to ensure that the foraging area of the hen harrier would suffer no net loss and would, overall, be enhanced through restoration and management of alternative areas of blanket bog and wet heath, the management of optimum habitat for hen harrier and other animals within the territory by felling and replacing the current closed canopy forest to ensure that, ultimately, there would be sufficient open habitat. The application acknowledged that current hen harrier foraging areas would be adversely affected, but the measures proposed would address and ultimately enhance the situation.

The CJEU found that there was a reasonable scientific doubt remaining at the time the planning permission was granted, as to whether the hen harrier habitat management plan would be effective at avoiding an adverse effect on the integrity of the SPA. Such a measure may be taken into consideration when the AA is carried out only to the extent that the measures are certain. (see **Case C-142/16** *Commission v Germany*). Future effects of measures are difficult to forecast with any degree of certainty, as their effectiveness will only become apparent in the future. The CJEU considered that it was not the dynamic nature of the habitat management plan that caused the uncertainty, rather it was the inability to predict with certainty the *future benefits* of the measures proposed, without which the objectives of the site would not be met.

The competent authority must be certain that the plan or project will not have lasting adverse effects on the integrity of a European site. The necessary certainty is attained where *no reasonable scientific doubt remains* as to the absence of such effects. The necessary certainty must be attained by the date of adoption of the decision authorising implementation of the plan or project[82].

To authorise thinning when granting an afforestation licence, the Minister would have to be certain that the thinning activity, which would not take place for another 10 – 15 years or more, could not have an adverse effect on the integrity of any European site or its qualifying interests.

7.4 Dealing with legacy issues

In an ideal scenario, all forests would have been granted an afforestation licence ten or more years ago only after a thorough AA of the implications of that forest for any European sites. It will also have been assessed to ensure no deterioration to the status of water bodies, and no disturbance of species or habitats. As Ireland did not properly transpose the Habitats Directive until 2011, and in a forestry context until 2019/2020, there are forests which have been licensed without a robust prior AA or assessment of water impacts or impacts on species.

In **Case C-254/19** *Friends of the Irish Environment*[83] the Advocate General expressed the view that, to close any gaps or lacunae in an earlier flawed Article 6(3) assessment, further scientific findings would be needed to take account of any intervening changes in the project, the protected habitats and species concerned, and the current state of scientific knowledge. Any other 'in combination' effects since the project was first authorised would have to be included, if they could have a significant effect on the European site concerned.

In some instances, therefore, it falls to the DAFM ecology section to assess the potential impact of felling, or of forest roads, without the benefit of baseline data regarding the site before it was granted an afforestation licence. In some instances, the ecology section may have to consider felling licence applications for forests in locations which today would not be favoured for forestry, or that type of forestry. Dealing with such legacy issues is complicated and slows the AA process.

7.5 Relying on 'mitigation' to avoid or reduce adverse effects on site integrity

Article 6(2) of the Habitats Directive requires Member States to adopt, where necessary, measures to *avoid* deterioration of habitats and disturbance of species. This is supplemented by the obligation under Article 6(3) to incorporate and assess 'protective', or 'mitigation', measures proposed as part of a plan or project. *All aspects* of the plan or project must be identified, including any protective measures intended to avoid or reduce the effects of the plan or project on a European site concerned.

The AA must remove *all reasonable scientific doubt* as to the effects of the plan or project on the European site concerned, which necessarily includes also any reasonable scientific doubt as to the effectiveness of any protective measures in avoiding or reducing an adverse impact on the European site. For example, the hen harrier habitat management plan at issue in **Case C-164/17** *Grace and Sweetman* lacked certainty as to whether it would be effective at avoiding harm. The developer had not established *beyond all reasonable doubt* that the project incorporating the protective measures would not adversely affect the integrity of the European site, which was designated for the protection of the hen harrier.

The AA procedure cannot be based on broad assumptions about what may or may not happen in the future, which is another reason why it is challenging to seek approval for projects subject to AA which will only take place at an unspecified date in the distant future.

7.6 Mitigation versus 'compensation'

The CJEU determined that the hen harrier habitat management plan in **Case C-164/17** *Grace and Sweetman* was more akin to a compensatory measure than a mitigation measure. It did not avoid harm to the habitat of hen harrier but sought to ensure no net loss and overall enhancement of hen harrier habitat. *Compensatory* measures seek to compensate for the negative effects a plan or project will have on a European site. Mitigation or preventative measures avoid those negative effects entirely.

In **Case C-521/12** *Briels and Others*[84], and **Case C-387/15 and C-388/15,** *Orleans and Others*[85] the CJEU held that the measures proposed were compensation, not mitigation. Compensation measures fall to be considered under Article 6(4), after alternative less harmful solutions have been excluded.

In **Joined Cases C-293/17 and C-294/17** *Coöperatie Mobilisation for the Environment* the CJEU held that assumptions based on predicted reductions in nitrogen depositions could not be relied upon in excluding significant / adverse effects. The CJEU held that as Article 6(1) and (2) of the Habitats Directive already require Member States to adopt the necessary conservation and avoidance measures to protect and conserve SACs and SPAs, it is not permissible to invoke such measures to justify a project which has implications for the European site concerned before those measures have been implemented. The CJEU reinforced the distinction between mitigation measures to avoid harms, which must be subject to AA under Article 6(3), and measures to compensate for harm, which can only be considered under Article 6(4). An adaptive management approach, of continuous monitoring and adjustment, was found to be insufficiently certain to underpin an Article 6(3) assessment because it was based on future benefits that had not yet been realised.

7.7 EC Methodological Guidance on Article 6(3) and 6(4)

Section 3.2.4 of the EC Methodological Guidance states:

> *"Mitigation measures may be proposed by the plan or project developer or required by the competent national authorities in order to remove, pre-empt or reduce the impacts*

identified in the appropriate assessment to a level where they will no longer affect the integrity of the site.

In practice, the need for mitigation measures is often acknowledged at an early stage in the design or inception stages of a plan/project (for example at a 'pre-application' discussion between the developer/applicant and the nature conservation advisers) and included as part of the application for authorisation. Although mitigation measures cannot be taken into consideration when screening the plan or project, the fact that they have been identified as necessary can greatly assist the efficient, effective and timely execution of the appropriate assessment stage, and hence the decision on whether the plan/project can be authorised under Article 6(3).

The hierarchy of mitigation measures suggests first avoidance (i.e., preventing significant impacts from happening in the first place) and then reduction of impact (i.e., reducing the magnitude and/or likelihood of an impact). Examples are given in table 6 below:

….

At the level of plans, mitigation measures may include e.g. re-locating or removing components of the plan identified as having significant adverse effects on the site integrity. The proposed measures can be fine-tuned throughout the assessment process. At a high level of planning (e.g. in national/regional plans), mitigation could imply setting out potential measures to be worked out in more detail at a lower level, in line with the ecological, locational, timeframe, legal and financial parameters to be met as part of any planning application.

Mitigation measures ***must not be confused with compensatory measures*** *which are only considered under the Article 6(4) procedure (see section 3.3.3 of this document).*

…

Specifically, measures which are not functionally part of the project, such as habitat improvement and restoration (even if contributing to a net increase of the habitat area within the affected site) or creation and improvement of breeding or resting places for the species, should not be considered as mitigation as they do not reduce negative impact of the project as such. This type of measures, if they are outside the normal practice required for the conservation of the site, meet rather the criteria for compensatory measures.

"**Table 6**" in the EC Guidance sets out examples of mitigation measures which should be considered in the AA procedure:

"Avoiding impact:

- *technical solutions to prevent negative effects of the plan or project (e.g., noise or light or dust suppression devices);*
- *placing of project elements to avoid sensitive areas (entire* Natura 2000 *sites or key areas within or connecting Natura 2000 sites);*
- *protective fences and other measures to prevent damage to vegetation or wildlife;*
- *avoidance of works during sensitive periods (e.g., breeding season of species);*
- *optimisation of coordination of works to avoid cumulative impacts.*

Reducing impact:

- *emission controls;*

- *noise barriers such as screens;*
- *pollutant interceptors;*
- *controlled access to sensitive areas during construction/operation;*
- *wildlife crossings (e.g., bridges, tunnels and 'eco-ducts');*
- *adapting impact-generating actions to reduce effects to the extent possible (e.g., from noise, light, dust …)*

7.8 Case C-441/17 *Commission v Poland (Białowieża Forest)*

The Puszcza Białowieska Natura 2000 site includes one of the best-preserved natural forests in Europe. It hosts Annex I habitats and Annex II species, including a beetle subject to strict protection under Annex IV(a) and Article 12 of the Habitats Directive. It also hosts Annex I bird species and migratory birds protected under Article 4 of the Birds Directive. It is subject to ongoing logging operations.

Between 2003 – 2012, approximately 1.5 million m^3 of timber was extracted from the three Forest Districts under the management of the State Forest Office. In 2012, the Minister for Environment in Poland adopted a Forest Management Plan 2012-2021 (FMP 2012) with an accompanying EIAR. Just under 0.5 million m^3 of timber extraction from the three Forest Districts was authorised under FMP 2012, over a ten-year period. For the Białowieża Forest District, a cap of just over 0.06 million m^3 was set. This cap was reached within the first four years of the 10-year Plan. There was a corresponding spread of the Spruce Bark Beetle in that period. In 2015, a conservation management plan was adopted for the Natura 2000 site. Conservation objectives and threats were identified, including threats to the protected species and habitats. In 2016 the FMP 2012 was amended, increasing the volume of timber which could be extracted through thinning and felling from the highly sensitive Białowieża Forest District area, from the previous cap of just over 0.06 million m^3 to a new cap of almost 0.19 m^3. The area of afforestation and reforestation was increased from 12.77 ha to 28.63 ha. The justification given for the increased logging was '*the occurrence of serious damage within forest stands, as a result of the constant spread of the spruce [bark] beetle, resulting (during the implementation period of the 2012 FMP) in the need to increase logging … in order to maintain the forests in an appropriate state of health, to ensure the sustainability of the forest ecosystems and to halt the deterioration and undertake a process of regeneration of natural habitats, including habitats of Community interest'.*

Following conditional approval of the revised FMP, logging took place across an area comprising more than half of the total area of the Natura 2000 site, with particularly high levels of extraction from the Białowieża Forest District area.

In a lengthy judgment, the CJEU held that:

- Obligations under Article 6(3) of the Habitats Directive replace any obligations that would have arisen for SPAs under Article 4(4) of the Birds Directive (C-461/14 *Commission* v *Spain)*.

- The AA must be of all aspects of the plan or project which can, either by themselves or in combination with other plans or projects, affect the conservation objectives of that site. Accordingly, all aspects must be identified in the light of the best scientific knowledge in the field (Joined Cases C-387/15 and C-388/15 *Orleans and Others*; C-142/16 *Commission* v *Germany)*.

- The AA may not have lacunae and must contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned (C-258/11 *Sweetman and Others;* Joined Cases C-387/15 and C-388/15 *Orleans and Others*).

- The plan or project may be authorised only if it will not adversely affect the integrity of the site concerned, subject to Article 6(4).

- The integrity of a site as a natural habitat will not be adversely affected for the purposes of Article 6(3) where it is preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.

- A competent authority may only authorise the plan or project, therefore, where they are certain that the plan or project will not have lasting adverse effects on the integrity of the site concerned. That is the case where no reasonable scientific doubt remains as to the absence of such effects (C-258/11 *Sweetman and Others;* C-243/15 *Lesoochranárske zoskupenie VLK)*.

- Article 6(3) integrates the precautionary principle, making it possible to prevent in an effective manner adverse effects on the integrity of protected sites because of the plans or projects envisaged. A less stringent authorisation criterion could not ensure as effectively the fulfilment of the objective of site protection (C-258/11 *Sweetman and Others;* Joined Cases C-387/15 and C-388/15 *Orleans and Others)*.

- A competent authority may therefore not authorise an intervention which risks lasting harm to the ecological characteristics of sites which host natural habitat types of Community interest or priority natural habitat types. That would particularly be so where there is a risk that an intervention will bring about the disappearance or the partial and irreparable destruction of such a natural habitat type present on the site concerned (C-461/14 *Commission* v *Spain;* C-258/11 *Sweetman and Others)*.

- A competent authority must be certain at the date of the authorisation/decision implementing the plan or project that there is no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (C-239/04 *Commission* v *Portugal;* C-142/16 *Commission* v *Germany)*.

- An AA cannot be regarded as 'appropriate' where updated data concerning the protected habitats and species is lacking (C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others)*.

The CJEU held that the AA of the revised FMP in 2016 had lacunae and therefore did not meet the requirements of Article 6(3) for the following reasons:

- It did not consider all aspects of the proposed plan or project as it related only to one of the three Forest Districts, and it did not consider the in-combination effects of the proposed plan or project with other plans or projects.

- It lacked up-to-date data on habitats and species, which was particularly problematic where the justification for the amendment was based on events which had occurred after the FMP 2012 was adopted (the increase in the spruce bark beetle).

- The competent authority could not have been certain at the date of approval of the 2016 amendment that there was no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the Natura 2000 site. This is borne out by the fact that the remediation programme and subsequent formal Decisions of the Forest Service made provision for 'functional reference areas' which would be left largely undisturbed, to compare the development with the areas subject to the active forest management operations. At the time of the adoption of the 2016 Amendment and subsequent formal decisions, the Polish authorities did not have the results of such study and could not have been certain of the impact of the active forest measures.

- The assessment did not refer to the conservation objectives of the protected habitats and species, nor does it define the integrity of the Natura 2000 site, nor does it carefully examine the reasons why the forest management operations at issue are not liable to affect the site adversely. The assessment does not examine in a systematic and detailed manner the risks that the implementation of the operations entails for each of the protected habitats and species within the Natura 2000 site.

Human activity is not precluded within a Natura 2000 site, but it must be consistent with the conservation objectives for the site. Poland could only authorise the active forest management operations if they did not adversely impact the species for whom the site was designated. While the forest operations were directed at the felling of trees colonised by the spruce bark beetle, there were few if any conditions imposed to restrict the impact on the integrity of the site, for example:

- No restriction on the age of the trees
- No restriction on the felling of trees within the protected habitats
- Trees could be felled under the general 'public safety' provision with no further restriction or condition
- There was no restriction on the species of tree which might be felled, once they are dead, dry, or dying.

Many of the forest management operations constituted precisely the threats identified in the Natura 2000 site conservation management plan. The removal of trees more than 100 years old, the removal of trees (including dead or dying trees) hosting protected species, posed direct threats to those species. The level and intensity of felling (and the quantities of timber targeted for extraction) far exceeded what might have been necessary to control or restrict the spread of the spruce bark beetle. Indeed, the CJEU noted that there remained scientific controversy and doubt as to the most appropriate method to stop the spruce bark beetle, and there was no scientific certainty that the active forest management operations at issue would not have lasting adverse effects on the integrity of the site concerned.

Poland could not rely on Article 6(4) to justify a derogation from the requirements of Article 6(3), based on public safety or the need to exploit the forest for economic or social reasons, as Article 6(4), as a derogation from the objectives of the Directive, must be interpreted strictly.

Article 6(4) can only be applied after the implications of a plan or project have been properly analysed in accordance with Article 6(3). Knowledge of the implications of the plan or project, in the light of the conservation objectives for the site in question, is a prerequisite for the application of Article 6(4). The assessment of any imperative reasons of overriding public interest and the existence of less harmful alternatives require a weighing up against the damage caused to the Natura 2000 site by the plan or project under consideration. Further, the damage must be precisely identified for the appropriate compensatory measures to be defined[86].

8 Environmental Impact Assessment Directive

8.1 Key points

The EIA Directive only applies to project types listed in either Annex I or Annex II of the Directive. The list of project types, which was drawn up by the Member States in 1985, has not changed significantly in almost 40 years. That list includes: restructuring of rural landholdings (Class 1(a)); the use of uncultivated or semi-natural areas for intensive agriculture (Class 1(b)); water management, irrigation and land drainage linked to agriculture (Class 1(c)); initial afforestation (Class 1(d)); deforestation for the purposes of converting to another land use (Class 1(d)); construction of roads (Class 10(e)); and any change or extension to one of these project types, where the change or extension is likely to have significant effects on the environment (Class 13(a)).

If an afforestation licence application and a forest road application will be subject to a requirement for EIA screening. They also require a development consent process, such as a licence or other type of authorisation. A felling licence application could also be subject to EIA screening if it involves land drainage or other works potentially coming within the scope of one of the other project types. Felling for the purposes of deforestation is subject to EIA.

EIA screening must be carried out in accordance with the criteria specified in Annex III of the EIA Directive. The Directive envisages that the applicant seeking permission will provide the information specified in Annex IIA, to inform the EIA screening process.

Where the afforestation is of a landholding of 50 hectares or more, EIA will be mandatory. Below 50 hectares, EIA screening is mandatory unless the project is truly *de minimis* such that it could have no appreciable effect on the environment. As the competent authority, the Minister is required to make an EIA screening determination that the proposed project is / is not likely to have significant effects on the environment.

Significant effects may be both positive and negative[87]. Significant effects may arise from below-threshold projects, particularly when considered in combination with other projects. A project proponent may propose and incorporate mitigation measures in a project proposal which may be considered in carrying out EIA screening to determine whether, with mitigation, the effects of the project are likely to be significant. As Holland J highlighted in *Monkstown Road Residents' Association*, when carrying out EIA screening it is important not to confuse the acceptability of effects with the significance of effects. An effect may be both significant (and therefore require EIA) and acceptable, and the acceptability of an effect in the opinion of the competent authority renders it no less significant from an EIA screening perspective.

When assessing an application for an initial afforestation licence, it is necessary to define the whole project for that purpose. To that end, it is necessary to define all works and activities in respect of which there is a causal connection with the initial afforestation which is *demonstrably strong and unbreakable* that they should form part of the EIA procedure. An integrated single licence application approach to the entire life cycle of a forestry project would impose the EIA procedure to all of the project elements with a clear and unbreakable connection between them. The EIA procedure would apply to the whole project, and the AA procedure would equally apply to the whole project. This approach to the regulation of forestry would present *at least* the following difficulties:

- A whole life-cycle forestry project such as this would be virtually impossible to 'screen out' for the purposes of EIA. Each such application would require an EIAR and considerable supporting technical detail would need to be worked out in advance, to enable the EIA to be carried out in accordance with the requirements of the EIA Directive.

- Over time, any significant change or extension to the project as previously authorised would require a further EIA and development consent procedure before it could be permitted to proceed, which would somewhat defeat the purpose of having a single integrated authorisation at the outset.

- The AA procedure would apply to the whole project, with the result that the competent authority would need to be certain at the time the licence is granted, beyond all reasonable scientific doubt, that the proposed forestry project would not have adverse effects on any European site, despite that some aspects of the project would not be undertaken for well over ten years after the initial licence is granted.

The EIA Directive does not require a single development consent application once the objectives of the EIA Directive are not circumvented by the granting of separate consents for different aspects of an overall project.

In several EU Member States, however, an initial afforestation licence application is approved, and part of that approval includes the proposed forest management plan setting out how the forest will be managed in accordance with sustainability rules over the life of the plan, which is typically 5 years but in some cases 10 years. In Case C-661/20 *Commission v Slovak Republic*[88], legislation which exempted forest management plans and modifications to FMPs from the obligation to carry out AA was inconsistent with the Habitats and Birds Directives, where those plans were likely to have a significant effect on a European site. In Joined Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen*[89] the proposed thinning of two areas of forest (not within an European site) came within the parameters of the approved FMP and was therefore subject to a notification procedure to the relevant Forestry Agency. The authorisation of activities pursuant to a FMP must be capable of anticipating the potential for harmful effects on species protected by the Habitats and Birds Directives, wherever they occur, and must involve binding, specific conditions and rules, enforceable with penalties, and subject to monitoring and supervision, to ensure that the approach meets the requirements of a system of strict protection for such habitats and species. The FMP approach to authorising recurring activities such as thinning and active forest management therefore requires a level of ongoing resources for the appropriate levels of supervision, monitoring and enforcement to ensure the strict protection of European sites and species.

8.2 Purpose of EIA Directive

The EIA Directive requires that, before authorisation is given for a project type listed in Annex I or Annex II, an assessment of the likely significant environmental effects of the proposed project is carried out. Where the project is below-threshold, and save with respect to truly *de minimis* projects with no appreciable effect on the environment, a screening assessment must be carried out to determine whether the proposed project is likely to have significant effects.

In *An Taisce v An Bord Pleanála (Kilkenny Cheese)*[90] the Supreme Court held that the EIA Directive seeks to ensure that the likely environmental impacts of any major project are themselves considered and assessed before any development permission is granted. As the Supreme Court held in *Fitzpatrick v An Bord Pleanála*[91] "*the outcome of that examination, analysis, evaluation and identification informs, rather than determines, the planning decisions which should or may be made*".

The High Court in *Friends of the Irish Environment (peat exemption)*[92] held that the EIA Directive obliges Member States to adopt all measures necessary to ensure that projects listed in the Directive are made subject to a requirement to obtain development consent, and that the EIA / EIA Screening are carried out prior to the development consent[93]. The Directive requires effective, proportionate, and dissuasive penalties to be put in place for non-compliance with the Directive.

8.3 Scope of EIA Directive - Projects

The EIA Directive only applies to projects which

- meet the definition of 'project' under Article 1(2)(a), and
- correspond to a project type listed in either Annex I or II of the Directive[94].

The definition of 'project' under Article 1(2)(a) of the EIA Directive is:

- '*the execution of construction works or of other installations or schemes'*, or
- '*other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources*.[95]'

In Case C-274/09, *Brussels Hoofdstedelijk Gewest and Others,* a permit to continue to operate an existing airport did not constitute a 'project' as there were no works or other interventions.

In Case C-142/07 *Ecologistas en Acción-CODA,* the refurbishment of an existing road was a project even though it did not involve the construction of a new road; class 7(b) *Construction of motorways and express roads*.

In Case C-2/07 *Abraham and Others,* physical alterations to airport infrastructure was a project even though it did not involve the construction of a new runway; class 7(a) *Construction …of airports with a basic runway length of 2,100m or more.*

8.3.1 A broad, purposive interpretation of Annex I and II is required

In Case C-72/95 '*Kraaijeveld'* the CJEU held that the EIA Directive is aimed at projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size, or location, and that the wording of the Directive indicates that it has a wide scope and broad purpose. The project types listed in Annex I and Annex II must therefore be interpreted broadly, not literally, to give full effect to the environmental objectives of the Directive.

This purposive interpretative approach was manifest in the CJEU's ruling in Case C-215/06 *Commission v Ireland (Derrybrien)*[96]*.* At the time that the authorisation was initially granted for the development, wind farms were not expressly listed in Annex I or Annex II. The CJEU held that:

- "road construction" of internal tracks and roads within the wind farm site, came within Annex II, class 10(d),
- "peat extraction" during construction of the access tracks and turbine foundations, came within Annex II, class 2(a), and
- "*deforestation for the purposes of conversion to another type of land use*" with the felling of trees for the purposes of constructing the wind farm, came within Annex II, class 1(d)

The CJEU was satisfied that, whilst these were secondary elements to the overall wind farm project, they were inseparable and significant parts of the overall project. This case also establishes that internal tracks and roads serving only the development itself can constitute 'road construction' as a class of project to which the EIA Directive applies.

8.4 Annex II Project types potentially relevant to forestry[xx]

Considering the CJEU's purposive interpretative approach, the following project types listed in Annex II may be of relevance to the licensing of certain projects or activities in the forestry sector:

8.4.1 Class 1(a) Projects for the restructuring of rural land holdings

Under the EC (EIA) (Agriculture) Regulations 2011 (S.I. No. 456/2011), as amended, there are three prescribed thresholds:

- De minimis, below which no authorisation or screening is required: where the field boundary to be removed is less than 500m in length, or where the work involves recontouring and the area is below 2ha
- Authorisation and screening required: where the field boundary to be removed is more than 500m but less than 4km in length, or more than 5ha but less than 50ha, or where the work involves recontouring and the area is between 2ha and 5ha
- Authorisation and mandatory EIA: where the field boundary to be removed is 4km or more in length, or 50ha or more in area, or where the work involves recontouring and the area is above 5ha

The setting of *de minimis* thresholds below which it is anticipated that a project would never have significant effects, is subject to strict conditions related to the nature and characteristics of the land and its relative sensitivity to such works. Accordingly, the Regulations aim to exclude from any such exemption activities of this nature that would significantly affect a European site or a natural heritage area.

8.4.2 Class 1(b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes

The EC (EIA) (Agriculture) Regulations 2011 (S.I. No. 456/2011), as amended, provide that authorisation and screening is required where such work would be undertaken on sites with an area of 5ha or more, and authorisation and EIA is mandatory for sites of 50ha or more. There is no definition of intensive agricultural works within the EIA Directive or the transposing regulations.

8.4.3 Class 1(c) Water *management projects for agriculture, including irrigation and land drainage projects*

The EC (EIA) (Agriculture) Regulations 2011 (S.I. No. 456/2011) as amended, require authorisation and screening for land drainage works on lands used for agriculture where the area would be above 15ha, and EIA is mandatory where the area would be above 50ha.

8.4.4 Class 1(d) *Initial afforestation and deforestation for the purposes of conversion to another type of land use*

(i) Initial afforestation of 50ha or more

"Afforestation" is defined in the Forestry Act 2014 as '*the conversion of land to a forest*' where 'forest' is defined as land under trees with (a) a minimum area of 0.2ha, and (b) tree crown cover of more than 20% of the total area, or the potential to achieve this cover at maturity, and includes all species of trees. This definition is consistent with the Land Use Land Use Change and Forestry Regulation, which defines in Annex II the minimum values for area size, tree crown cover, and tree

[xx] Forestry-related activities are unlikely to fall within any of the project types listed in Annex I, which includes primarily large-scale industrial-type developments.

height parameters for afforestation (the conversion of land to a forest). The parameters for other Member States are slightly different.

There is no definition of afforestation in the EIA Directive, and no thresholds are applied.

Section 30(8) of the Forestry Act 2014 provides that the Minister may make regulations to give effect to EU law relating to forestry and forestry-related activities, including: *(b) the establishment of procedures for afforestation and forest road works in respect of development consent* within the meaning of the EIA Directive. To that end, Part 7 of the Forestry Regulations 2017, as amended, sets an EIA threshold for initial afforestation of 50 hectares or more. EIA screening is mandatory below that threshold.

The EIA threshold of 50ha above which EIA is mandatory constitutes a reduction from what was originally a threshold of 200ha and then 70ha. In Case C-392/96 *Commission v Ireland*[97] the CJEU found that, by setting a threshold which *only* took account of the size of projects, Ireland exceeded the limits of the discretion available to it under the EIA Directive by failing to ensure that projects likely to have a significant effect on the environment are subject to screening.

By comparison, the Region of Wallonia applies a 50ha threshold for initial afforestation; Scotland applies a threshold of 20ha, except in sensitive or scenic areas in which case the threshold is 2ha. In Denmark, on the other hand, there is no national threshold for afforestation EIA. Each proposed afforestation project is screened to determine whether it is likely to affect the environment significantly, by reference to the EIA screening criteria laid down in the Danish Environmental Assessment Act.

The critical issue in terms of effective environmental protection is not the threshold, *per se*, but rather the quality and effectiveness of the EIA Screening procedure, to ensure that initial afforestation projects likely to have a significant effect on the environment are subject to prior assessment of their implications on the environment in accordance with the EIA procedures.

Initial afforestation does not require planning permission in addition to an afforestation licence[98].

Natural regeneration is not a specified class of project under the EIA Directive. As it does not generally involve any *works* or any other *intervention* in the natural environment, it is unlikely to constitute a 'project' in respect of which EIA screening would be required.

(ii) Deforestation for the purposes of conversion to another type of land use

Deforestation is defined in the Forestry Act 2014 as the conversion of a 'forest' into land that is not a forest. Felling does not constitute deforestation where there is a replanting or a management obligation for continuous coverage.

Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, lists two types of 'deforestation' to which the EIA Directive applies:

- Replacement of broadleaf high forest by conifer species, where the area involved would be greater than 10 hectares; and
- Deforestation for the purpose of conversion to another type of land use, where the area to be deforested would be greater than 10 hectares of natural woodlands or 70 hectares of conifer forest.

Deforestation may require planning permission, depending on the nature of the development.

The CJEU confirmed in Case C-329/17 *Prenninger & Ors*[99] that class 1(d) of Annex II does not cover any felling, just deforestation carried out *for the purpose of conferring a new use on the land concerned*. The referring Court had been concerned that the CJEU decision in **Case C-215/06** *Commission v Ireland (Derrybrien)* seemed to suggest that the class of project should apply whenever deforestation is likely to cause a significant effect on the environment, but the CJEU clarified that the conversion to a new land use is an integral part of the project type.

The Austrian legal provisions in question in that case required the felled area (for the purposes of constructing overhead electrical powerlines) to be replanted, however the CJEU held that this was not sufficient to set aside the fact that the land concerned had been put to a new use:

> "*the fact that the trees felled are immediately replaced by other forest vegetation, either naturally or artificially, has no bearing on the fact that the land affected by the clearance of a path has gained a new use, namely that of supporting the transportation of electrical energy*".

The Planning and Development Act 2000, as amended, exempts development consisting of the *use of land for the purpose of agriculture* and development consisting of the use for that purpose of any building occupied together with land so used. There is no requirement for planning permission for the thinning, felling or replanting of trees, forests or woodlands or works ancillary to agriculture development, but not including the replacement of broadleaf high forest by conifer species.

The Planning and Development Regulations 2001, as amended, Regulation 8F exempts:

> "*Development (other than the replacement of broadleaf high forest by conifer species) that is licensed or approved under section 6 of the Forestry Act 2014 (No. 31 of 2014) and that consists of – (a) the* thinning, *felling or replanting of trees, forests or woodlands, or (b) works ancillary thereto, shall be exempted development*."

The Planning and Development Regulations 2001, as amended, exempts development in rural areas comprising the replacement of broadleaf high forest by conifer species in an area of less than 10 hectares. This exemption is, however, subject to the restriction in Article 6 of the Planning and Development Regulations 2001 that development shall not be exempt where it is subject to a requirement for EIA or AA. Where the replacement of broadleaf high forest by conifer species would be in an area of 10ha or more, the Planning and Development Regulations 2001, as amended, Schedule 5, Part 2, class 1(d)(ii) requires such development to be subject to EIA and prior authorisation.

8.4.5 Class 10 (e) Construction of forest roads.

The construction, maintenance, improvement of a road (other than a public road) that serves a forest or woodland, or works ancillary to such road works, is exempt from the requirement for planning permission. The Planning and Development Regulations 2001, as amended, provides in Regulation 8G that

> "*Development (other than development consisting of the provision of access to a national road within the meaning of the Roads Act 1993 (No. 14 of 1993)) that is licensed or approved under section 6 of the Forestry Act 2014 (No. 31 of 2014) and that consists of- (a) the construction, maintenance or improvement of a road (other than a public road within the said meaning), that serves a forest or woodland, or (b) works ancillary thereto, shall be exempted development*".

Part 7 of the Forestry Regulations 2017, as amended, provides that EIA is required for: *forest road works which would involve a length of* ***2000 metres or more****,* and that screening is required for *forest road works which does not exceed a length of 2000 metres but which the Minister considers likely to have significant effects on the environment taking into account the criteria set out in Schedule 3."*

The COFORD Forest Road Manual: *Guidelines for the design, construction and management of Forest Roads (COFORD 2005)*[100] states (erroneously) that:

> *"The construction of forest roads is not subject to EIA, although there is provision for the introduction of sub-thresholds and examination on a case-by-case basis where it is deemed that the development could have a significant impact on the environment."*

The Minister may require an EIAR for a sub-threshold forest road where, following EIA Screening, significant effects on the environment are considered likely.

8.4.6 Class 13. (a) *Any change or extension of projects listed in Annex I or this Annex, already* authorised, executed or in the process of being executed, which may have significant adverse *effects on the environment (change or extension not included in Annex I).*

This is a class of project under the Planning Regulations. There is no equivalent in the Forestry Regulations, or the EC (EIA)(Agriculture) Regulations 2011, as amended. Any change or extension to an EIA class of project should always be subject to EIA Screening.

8.5 A 'development consent procedure' under EIA

A decision of a competent authority which entitles a project to proceed is a 'development consent' under the EIA Directive.

In Case C-121/11 *Pro Braine ASBL & Others,* a decision to allow the carrying on of operations at an already authorised and operational landfill site constituted a 'consent' for a project for the purposes of the EIA Directive, as otherwise it could not proceed to operate, and it also involved changes to the physical aspect of the landfill, not just the extension to the operating licence (distinguishing Case C-274/09).

In Case C-254/19, *Friends of the Irish Environment,* a decision to extend a grant of planning permission after the permission had expired constituted a grant of development consent for a project. Without the extension, the developer could not proceed. The development would have involved construction as, prior to the authorisation, no construction had commenced. It was irrelevant that there was no change to the proposed development in respect of which the prior authorisation had been granted. The CJEU has previously held in Case C-201/02 *Wells* that a decision does not have to change the project as originally authorised to constitute a 'development consent'.

On the particular facts of Case C-254/19, *Friends of the Irish Environment*, the CJEU was satisfied that a decision to extend a planning permission that had expired, for a development that had not yet been commenced, met the criteria for a project under the EIA Directive, involving both 'construction works' and 'alterations to the physical aspect of a site'. Therefore, the CJEU was satisfied that Article 6(3) was applicable to that decision. The CJEU distinguished previous decisions of the CJEU including Case C-226/08 *Stadt Papenburg* where the decision at issue related to works or an intervention in the natural surroundings which were continuing under the same conditions and on an uninterrupted basis since the 'project' was originally permitted.

In Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen,* the CJEU held that a legislative measure which, in effect, commenced a process of several consents which, together, would permit two nuclear power plants to resume operations subject to rejuvenation works, constituted a 'development consent' for the purposes of the EIA Directive.

In Case C-463/20 *Namur-Est Environnement ASBL v Région Wallonne*[101], the CJEU held that a derogation decision under Article 16 of the Habitats Directive, which authorises a developer to derogate from the applicable species protection measures in order to carry out a 'project' as defined in the EIA Directive, forms part of the 'development consent procedure' as defined in the EIA Directive, where (1) the project cannot be carried out without the derogation and (2) the competent authority with responsibility for deciding whether to grant development consent retains the ability to assess the project's environmental impact more strictly than was done in the derogation decision.

8.6 Screening for EIA

All sub-threshold EIA project types, unless truly *de minimis,* are subject to a requirement for EIA Screening. The competent authority when carrying out EIA Screening must have regard to the criteria in Annex III of the EIA Directive, and a project proponent is required to provide to the competent authority the EIA Screening information listed in Annex IIA of the EIA Directive.

Under section 11 of the Forestry Act, the Minister shall, in the performance of his or her functions under the Act, consider whether EIA screening or EIA is required, and whether an EIAR has been or should be submitted with the application. Where EIA is required for a proposed project, the Minister as competent authority is required to ensure that it is carried out.

Regulation 13(2) provides that the Minister shall require an EIAR for

(a) afforestation involving an area of 50ha or more, and

(b) forest road works involving a length of 2000m or more.

There are site notice requirements for afforestation and forest road applications, which are subject to EIA, but not for felling licences, which are not subject to EIA.

For afforestation and forest road applications below these thresholds, Regulations 5 and 6 of the Forestry Regulations set out the information to be provided by the applicant for the purposes of Screening for EIA (similar to Annex IIA) and the criteria to be considered by the Minister in EIA Screening (similar to Annex III).

The EIA Screening procedure differs significantly from the AA Screening procedure insofar as it expressly permits and indeed encourages the incorporation of mitigation and avoidance measures into the project design to avoid or reduce likely significant environmental effects.

The Screening for EIA does not require public participation, under the EIA Directive or the Forestry Regulations. However, Recital (29) to Directive 2014/52/EU provides that, in the context of screening for EIA,

> *"taking into account unsolicited comments that might have been received from other sources, such as members of the public or public authorities, even though no formal consultation is required at the screening stage, constitutes good administrative practice*."

8.7 Significance of Effects

The test for EIA Screening is whether the environmental effects of the proposed project are 'significant'. As highlighted by the High Court in *Monkstown Road Residents' Association*[102], the effects of a project on the environment can be significant (and require EIA) as well as being considered positive, and/ or acceptable. A competent authority may not screen out a requirement for EIA based on the subjective view as to the acceptability of the likely effects, if those effects are significant. Significant positive or negative environmental effects trigger a requirement for EIA.

8.8 Screening In-combination effects

In carrying out EIA Screening, one of the criteria to be considered under Annex III is *"the cumulation of the impact with the impact of other existing and/or approved projects".*

This differs to the AA Screening requirement insofar as it is limited to other existing and/or approved projects and does not include other *proposed* projects which are not yet approved.

Assessing the likely cumulative effects of a proposed project is one of the most challenging aspects of EIA Screening, this is particularly so where the proposed project is one of several small-scale projects which individually would not be significant.

In joined Cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment* the CJEU noted that, in the context of AA Screening, an assessment at the programmatic level makes it possible to examine the cumulative effects of nitrogen emissions on habitats more easily than at an individual project level. The same is true of EIA Screening, that the cumulative effects of several projects are more easily assessed at a plan or programme level, through the Strategic Environmental Assessment process.

8.9 Screening against a damaged baseline

In carrying out EIA screening, one of the criteria to be considered under Annex III is the *"areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation and relevant to the project, or in which it is considered that there is such a failure"*.

Where the baseline scenario is already poor, for example with threats to the status of water quality, or threats to species or habitats likely to be further affected by the proposed project, it may be that the proposed project could be the metaphorical straw that breaks the camel's back. In such circumstances, a project which might be insignificant in an area with a healthy baseline is nonetheless significant in the context of an area in which the baseline environment is already in difficulty.

The European Commission has formally adopted a Proposal for a Regulation on Nature Restoration[103]. It is intended that, when adopted, the Nature Restoration Regulation will require Member States to submit plans for the restoration of habitats within two years, incorporating an implementation plan. Ultimately this should force Member States to take such steps as are necessary to restore damaged and threatened habitats, thereby improving the resilience of areas for the benefit of future projects.

8.10 Time-limit for EIA Screening

The EIA Screening determination is to be made "*as soon as possible and within a period of time not exceeding 90 days from the date on which the developer has submitted all the information*".

The 90 days for screening may be extended, but only in *exceptional cases*, due to the nature, complexity, location, or size of the project. To avail of the extension, the competent authority shall give prior written notice of the delay, giving reasons, and giving a new date for the EIA

determination. A Member State may prescribe a shorter screening period than 90 days should it so wish.

There is an inherent difficulty with this 90-day period. It is intended to give prospective applicants certainty with respect to timelines and whether EIAR is required. The EIA Directive also requires that the competent authority take account of the results of other relevant assessments under other EU Directives when carrying out the EIA screening procedure. For example, the competent authority could rule out potential deterioration to a water body pursuant to Article 4(1)(a) of the Water Framework Directive, or the potential for adverse effects to the integrity of a European site under Article 6(3) of the Habitats Directive, by reference to separate assessments under those provisions, before reaching a conclusion on likely significant environmental effects under the EIA Directive. If those other assessments are only undertaken in parallel with the EIA Screening, a 90-day deadline for the EIA screening may be practically difficult to achieve.

8.11 Public Notice of EIA Screening Determination

Article 5 of the EIA Directive provides that the EIA screening determination shall be made available to the public and shall:

> *(a) where it is decided that an EIA is required, state the main reasons for requiring such assessment with reference to the relevant criteria listed in Annex III; or*
>
> *(b) where it is decided that an EIA is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.*

The Forestry Regulations provide in Regulation 21(1) that the Minister shall notify the applicant in writing and, subject to paragraph (2), any person who made a submission or observation, of *inter alia* the Minister's evaluation of the application to which Regulation 13 applies (EIA).

This provision does not expressly address the obligation to publish the EIA screening determination, save to the extent that the determination forms part of the decision on the application.

The Forestry Regulations, Regulation 21, allow the Minister to dispense with the obligation to notify participants directly once a decision is taken on the application, in the following circumstances: where there were (a) a large number of submissions or observations made as part of an organised campaign, or (b) the submission or observation is, in the opinion of the Minister, frivolous or vexatious, or (c) it is not possible to ascertain the name and address of a person who made a submission or observation. Whilst these precise provisions are not found in the EIA Directives, they may be justifiable where used only in the exceptional circumstances.

8.12 The EIA Procedure

The EIA Procedure is triggered in three ways:

(i) The project is above-threshold and an EIAR is submitted with the application;

(ii) The project is below-threshold but the applicant submits an EIAR with the application based on the applicant's view that the project is likely to have significant environmental effects; or

(iii) The competent authority (DAFM) has determined through EIA Screening that the project is likely to have significant effects on the environment and has required an EIAR to be submitted with the application.

Where an EIAR is submitted with an application, the initial public consultation must be for a period of *at least 30 days.* The Forestry Regulations provides for an initial consultation period of up to 30 days.

Regulation 13(3)(b) of the Forestry Regulations 2017, as amended, provides that the applicant shall submit an EIAR on request from the Minister. Regulation 13(4) provides that the Minister shall require the production of any necessary supplemental information for completing an EIA. The Minister may make a request for further information (RFI) under Regulation 13(10), and where the Minister determines that the EIAR is inadequate or incomplete, a notice may be served under Regulation 13 (12) requiring the applicant to remedy the inadequacies.

8.13 Public Participation in the EIA Procedure

Article 6(2) of the EIA Directive requires that the public shall be informed electronically *or by other appropriate* means, *early* in the decision-making and *at the latest as soon as* certain specified information can reasonably be provided. The prescribed information includes: (a) the application; (b) that the project is subject to EIA; (c) the competent authority from whom information can be obtained, and to whom comments can be submitted, and any details of the timing for the transmission of comments; (d) the possible decisions, and any draft decision; (e) the availability of the EIAR; (f) where and when the information may be available; (g) arrangements for public participation on the EIAR.

Article 6(5) provides that information on the EIAR should be electronically accessible through a central portal or easy points of access. Every EIAR submitted to DAFM should be registered in the DHLGH EIA electronic EIA portal[104].

The information that shall be made available to the public is prescribed in the Aarhus Convention and includes any reports and advice received by the competent authority at the time when the public concerned is informed. Article 6(6) guarantees members of the public a reasonable timeframe within which to respond to the different phases in the procedure, allowing *sufficient* time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making.

In Case C-463/20 *Namur-Est Environnement ASBL v Région Wallonne*[105], the CJEU considered that a derogation decision under Article 16 of the Habitats Directive, which authorises a developer to derogate from the applicable species protection measures in order to carry out a 'project' as defined in the EIA Directive, forms part of the 'development consent procedure' as defined in the EIA Directive, and consequently there is no requirement for that derogation decision to be subject to public participation once the public have an early and effective opportunity to participate in the development consent procedure under the EIA Directive, and the competent authority has the opportunity to make a more stringent decision and take account of the public submissions in that regard.

Regulation 13(13) of the Forestry Regulations provides that, where the Minister proposes to carry out EIA, the public shall be consulted in accordance with Regulation 10 of the Forestry Regulations before the EIA is completed. Regulation 13(15) provides that, in carrying out EIA, the Minister shall have regard to, and may adopt in whole or in part, any reports prepared by advisers, consultants, experts or other advisers.

8.14 Requirements for valid EIAR

Article 5(1) of the EIA Directive sets out the information to be included in the EIAR, as detailed in Annex IV of the Directive. The corresponding provisions of the Forestry Regulations, found in Schedule 4 of the Regulations, appear to be based on the EIA Directive 2011/92/EU before it was revised by Directive 2014/52/EU[xxi].

8.15 Formalities for an EIA Determination

Article 8a of the EIA Directive sets out the information which must be incorporated in the EIA Determination as part of the development consent procedure. The features of the project and measures envisaged to avoid, prevent, or reduce and, if possible, offset significant adverse effects on the environment must be clearly stated and enforceable as against the person who will carry out the proposed project. The competent authority must be satisfied that the reasoned conclusions on the significant effects on the environment remain up to date at the time the decision is made. The reasons for the decision must be given.

Article 9a of the EIA Directive requires that the competent authority or authorities perform the EIA duties in an objective manner and do not find themselves in a situation giving rise to a conflict of interest. This may require certain administrative barriers to be established in practice.

Article 10 of the EIA Directive requires that regulatory penalties be established for non-compliance with the EIA Directive, which are *effective, proportionate and dissuasive*. Part 8 of the Forestry Act 2014 sets out fines and penalties for various offences, which are not specifically directed at infringements of the EIA Directive but are nonetheless penalties for non-compliance with the requirements of the Act which incorporates the Directive.

There is no time-limit for an EIA Determination. Article 8a simply provides that the decision must be made within a *reasonable period*, and Article 9 provides that the public must be informed of the decision *promptly.* Notification of the decision must inform members of the public concerned that they have a right to an appeal and/or review procedure, in accordance with Article 11 of the EIA Directive.

8.16 Right to Appeal / to an effective review procedure

Member States have a discretion in how to organise the regulatory system in terms of providing rights of appeal and to a review procedure before a Court of law or another independent and impartial body established by law.

Members of the public concerned must be given a right to challenge the substantive or procedural legality of decisions, acts, or omissions subject to the public participation provisions of the Directive. Article 11 provides that national law can make provision for a preliminary review by an administrative authority and may require that such preliminary administrative review procedures are exhausted before recourse to the Courts and judicial review. Any review procedures shall *be fair, equitable, timely and not prohibitively expensive*.

Part 11 of the Forestry Act 2014 amended the Agricultural Appeals Act 2001 by inserting section 14A to establish the Forestry Appeals Committee to hear and determine appeals against decisions of the Minister or an officer of the Minister under the Forestry Act. The Forestry (Amendment) Act

[xxi] The Regulatory Review Report contains a Recommendation to amend the Forestry Regulations in this respect.

2020 amended section 14A of the Agricultural (Appeals) Act 2001 to refine the governance and flexibility of the Forestry Appeals Committee to form and hear such appeals as may be required from time to time. Significantly, the Forestry (Amendment) Act 2020 inserted a provision expressly requiring that the Committee "*be independent in the performance of its functions.*[106]"

Where a person is dissatisfied by a decision made by the Minister under a specified enactment that person may appeal to the Forestry Appeals Committee against the decision. There is no prior participation requirement therefore any person may appeal. The appeal must be lodged by post within 14 days of the date of the decision. The CJEU has confirmed that it is within each Member State's discretion to set times by which certain steps must be taken[107], but the appeals process must be reasonable in the context of the rights and obligations under the Aarhus Convention to an effective review mechanism.

An appeal is confined to the grounds of appeal lodged unless the Committee permits an appellant to amend those grounds of appeal.

The Forest Appeals Committee is granted extensive flexible powers under the Forestry (Miscellaneous Provisions) Act 2020 in the conduct of appeals, including the power to carry out EIA or AA, or screening for EIA or AA, and to substitute its own decision for that of the Minister, where appropriate. An appellant who is dissatisfied with a decision of the Committee may appeal that decision to the High Court on a question of law.

8.17 Legal Standing to Appeal / Challenge

In terms of standing to bring an appeal or apply to the High Court, Article 11 provides that such rights are enjoyed by a member of the *public concerned*, who:

- Has a sufficient interest in the matter, or
- Maintains an impairment of a right, where national law requires this as a precondition.

Article 1 of the Directive defines "*the public*" as one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organisations, or groups; and "*the public concerned*" as the public affected or likely to be affected by, or having an interest in, the environmental decision making.

For the purposes of this definition, a non-governmental organisation promoting environment protection and meeting any requirements under national law shall be deemed to have an interest in the environmental decision-making procedure.

Article 11(3) provides that, what constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistent with the objective of giving the public concerned *wide access to justice*. To that end, E-NGOs meeting any statutory requirements shall be deemed to have a sufficient interest and shall also be deemed to have rights capable of being impaired.

Under the appeals provisions of the Forestry Act, *any person* may appeal. There is no need to demonstrate prior participation in the procedure that led to the decision under appeal, nor is there any statutory rule which would facilitate unincorporated associations or groups from appealing to the Committee.

E-NGOs have a guaranteed right of appeal, derived from the Aarhus Convention and the EIA Directive, irrespective of prior participation in the decision-making procedure. If the right of appeal is to be reduced from 'any person' to a more specific category, any such restrictions must be based on the Article 11 test as set out above: whether they have a sufficient interest, or whether they maintain an impairment of a right which has been established in the national legal regime.

There are marginal differences in the appeals procedures in other EU Member States. In general, the right of appeal is based on a personal interest in the matter, or an impairment of a right. The response from the Wallonia Region of Belgium is that prior participation is *not* a pre-condition to appeal / review, which appears consistent with the CJEU rulings on this issue.

8.18 The 'whole project' approach to EIA

Recital (22) of the revised EIA Directive provides that "*screening procedures and environmental impact assessments should take account of the impact of the whole project in question, including, where relevant, its subsurface and underground, during the construction, operational and, where relevant, demolition phases.*"

Annex IIA of the revised EIA Directive provides that the information to be submitted by an applicant for EIA Screening shall include: "*a description of the physical characteristics of the whole project and, where relevant, of demolition works*".

The criteria in Annex III for determining whether a project is likely to have a significant effect on the environment includes: "*the size and design of the whole project*".

Annex IV provides that an EIAR shall include: "*a description of the physical characteristics of the whole project, including, where relevant, requisite demolition works, and the land-use requirements during the construction and operational phases.*"

In any EIA Screening or EIA procedure, it is essential to define the parameters of the 'whole project'.

In Case C-396/92 *Bund Naturschutz in Bayern and Ors. v. Freistaat Bayern*, the question arose in the context of a road project. The CJEU was asked whether the EIA procedure applied to (i) the entire long haul road route, which would be developed over stages subject to the availability of funding and procurement, or (ii) just that section of road in respect of which development consent was sought. This question was addressed only in the Advocate General's Opinion as it did not fall to be determined in the CJEU ruling on other matters. The AG acknowledged that ideally it would be the entire road route that would be assessed, but that is not what is required by the EIA Directive. The obligations under the Directive apply only to the first part of the proposed overall road route, the part for which consent is sought. The alternative interpretation would create difficulties in defining the parameters of an 'entire project', where there are elements involved in future phases which have not yet been worked out in detail. The Advocate General stated that it is: "*self-evident that the directive cannot indirectly have the effect of forcing the Member States to depart from the normal practice according to which long road links are executed by constructing sections over staggered periods*" (para. 69). The Opinion continued:

> *"71. The important question in the present connection is not, however, which projects are to be subject to an environmental impact assessment. It is whether, in connection with the environmental impact assessment of the specific project, there is an obligation to take account of the fact that the project forms part of a larger project, which is to be carried out subsequently, and in the affirmative, the extent to which account is to be taken of that fact. The subject-matter and content of the environmental impact assessment must be established in the light of the purpose of the directive, which is, at the earliest possible stage in the technical planning and decision-making processes, to obtain an overview of the effects of the projects on the environment and to have projects designed in such a way that they have the least possible effect on the environment, That purpose entails that as far as practically possible account should also be taken in the environmental impact assessment of any current plans to extend the specific project in hand."*

The CJEU has consistently held that the requirements of the EIA Directive shall be met at the earliest stage in the decision-making procedure (C-201/02 *Wells)*. The Advocate General's Opinion provides a practical solution to the problem where potential future phases of work are not yet fully worked out in detail. This 'whole project' issue has been the subject of significant scrutiny in the Irish Courts.

In *Fitzpatrick and Daly (Apple Data Centre)*[108] the Supreme Court held that the 'whole project' consisted of a first 30MW data centre hall and the associated electrical substation and connection to the grid, which had capacity to connect up to 240MW should future data centre halls be developed (subject to further planning). The argument before the Court was that the EIA should have assessed the likely future build-out of the entire data centre campus of potentially up to eight 30MW data centre halls, and that by restricting the EIA to just one 30MW data centre hall and the electrical connection, An Bord Pleanála had impermissibly facilitated project-splitting. The Supreme Court applied the AG's Opinion in Case C-396/92, and held that the EIA requirements applied to the development for which consent was sought (a single 30MW data centre hall and the electrical substation and grid connection) and that, with respect to the future potential build-out of further data centre halls, the environmental implications of same should be assessed *as far as practically possible* having regard to the state of knowledge about those future phases and the receiving environment at the time of the initial application. This was on the basis that the future phases would also be subject to EIA in advance of any grant of planning permission.

In *An Taisce (Kilkenny Cheese)*[109] one of the questions before the Supreme Court was whether the obligation to carry out EIA was just for the proposed cheese factory, or whether it extended also to include the environmental effects of the 4,500 Glanbia farms that would supply milk to the factory. The issue was whether these 'off-site' supply chain elements formed part of the whole project for which consent was sought, and therefore required to be part of the EIA procedure. In determining this issue, the Court had regard to the following judgments:

- In *An Taisce (Edenderry)*[110] the High Court had held that the extraction of peat as the fuel source for the power plant fell within the ambit of "indirect effects" of that power plant, on the basis that there was a *functional inter-dependence* between the project for which consent was sought (the extension to the life of the power plant) and the effect of the peat extraction which was exclusively used as feedstock for the power plant.

- In *Ó Grianna*[111] the High Court had held that the connection to the national grid of a wind farm is *an integral part of the overall development* of which the construction of the turbines is the first part, and that the connection to the national grid is *fundamental to the entire project*.

- In *Fitzpatrick and Daly (Apple Data Centre)* the Supreme Court considered that the *Ó Grianna* decision was based on a finding of fact that the project for which consent was sought was "*functionally or legally interdependent on a further development not included in the application for planning permission which might have environmental effects and in respect of which no EIA had been carried out*" whereas the data centre at issue in *Fitzpatrick* was not *functionally dependent* on any future data centre halls and was, in that sense, a standalone project.

- In *Kemper*[112] the High Court considered that the eventual use of bio-solids and other end-products of the proposed waste water treatment plant on *off-site* lands was not part of the project for which consent was sought or in respect of which EIA was required, as it was impossible to identify the lands which would ultimately use the end-products of the facility, and therefore it was not possible to determine the environmental effects of such use. The Court distinguished *An Taisce (Edenderry)* on this basis.

In *An Taisce (Kilkenny Cheese)* the Court determined that the EIA Directive should not be given such an open-ended interpretation that it would lead to the imposition of *an impossibly onerous and unworkable obligation on developers preparing an EIAR*. The Court, accordingly, determined that the obligation to carry out EIA and to assess the direct and indirect effects of a project, applies to the effects which *the development itself* is likely to have on the environment. There is no obligation to carry out EIA of the effects of *other projects* that might have downstream or upstream inputs or outputs connected with the proposed project.

In reaching this conclusion, the Supreme Court distinguished those other cases in which the *causal connection* between certain off-site activities and the operation and construction of the project itself is *demonstrably strong and unbreakable* such that the significant indirect environmental effects of these off-site activities should be assessed in the EIA (e.g., *An Taisce (Edenderry)* and *Ó Grianna).* The situation in *An Taisce (Kilkenny Cheese)* was closer to *Fitzpatrick and Daly, and Kemper.*

8.19 The 'whole project' in an initial afforestation licence application

When assessing an application for an initial afforestation licence, it is necessary to define the whole project for that purpose. To that end, it is necessary to define all works and activities in respect of which there is a causal connection with the initial afforestation which is *demonstrably strong and unbreakable* that they should form part of the EIA procedure.

For example, if in the initial afforestation licence application an applicant sought consent not only for planting, but also for all forest roads and associated works, for all 'thinning' and management felling that might be required to be undertaken as the forest matures, and the final harvesting of the forest, including any replanting which may be required as a condition of the authorisation to fell. In the circumstances of such an integrated single licence application approach to the entire life cycle of the forestry project, the EIA procedure would apply to all of those elements as there would be a clear and unbreakable connection between them. The EIA procedure would apply to the whole project, and the AA procedure would equally apply to the whole project.

This approach to the regulation of forestry would present *at least* the following difficulties[xxii]:

- A whole life-cycle forestry project such as this would be virtually impossible to 'screen out' for the purposes of EIA. Each such application would require an EIAR and considerable supporting technical detail would need to be worked out in advance, to enable the EIA to be carried out in accordance with the requirements of the EIA Directive.

- Over time, any significant change or extension to the project as previously authorised would require a further EIA and development consent procedure before it could be permitted to proceed, which would somewhat defeat the purpose of having a single integrated authorisation at the outset.

- The AA procedure would apply to the whole project, with the result that the competent authority would need to be certain at the time the licence is granted, beyond all reasonable scientific doubt, that the proposed forestry project would not have adverse effects on any European site, despite that some aspects of the project would not be undertaken for well over ten years after the initial licence is granted[113]. It is the competent authority, not the project promotor, who is required to ensure that all aspects of the proposed project for which consent is sought are assessed to the standard required by the Habitats Directive. The competent authority must *catalogue and assess all aspects of a plan or project that might affect the conservation objectives of protected sites* before consent is granted. The

[xxii] The Regulatory Review Report recommends against adopting an integrated licensing approach to cover all forestry activities under a single licence.

conditions to be attached to control the parameters of the project must be "*strict enough to guarantee that those parameters will not adversely affect the integrity of the site.*[114]"

The EIA Directive does not require a single development consent application once the objectives of the EIA Directive are not circumvented[115] by the granting of separate consents for different aspects of an overall project.

8.19.1 Forest Management Planning approach

In several EU Member States an initial afforestation licence application is approved, and part of that approval includes the proposed forest management plan setting out how the forest will be managed in accordance with sustainability rules over the life of the plan, which is typically 5 years but in some cases 10 years. The forest management plan is subject to AA. In Case C-661/20 *Commission v Slovak Republic*[116], legislation which exempted forest management plans and modifications to FMPs from the obligation to carry out AA was inconsistent with the Habitats and Birds Directives, where those plans were likely to have a significant effect on a European site.

In Joined Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen*[117] the proposed thinning of two areas of forest (not within an European site) came within the parameters of the approved FMP and was therefore subject to a notification procedure to the relevant Forestry Agency. The notification outlined the trees to be felled and confirmed compliance with the applicable forest standards / guidelines with respect to the retention of certain trees. In response to the notification, the Forestry Agency issued specific guidelines setting out the precautionary measures to be taken in carrying out the proposed felling. The guidelines are non-binding but there is a general expectation of compliance. Two NGOs requested that a higher authority intervene, which it did but ultimately determined that the precautionary measures outlined in the guidance would be sufficient to harm to species protected under the Habitats Directive. On appeal from this decision, the Swedish Court referred various questions to the CJEU. With respect to the notification procedure which gave rise to the referral in this case, the CJEU noted that:

- no voluntary forestry plan had been submitted to or assessed by the Forest Agency in the context of processing the felling *notification*,
- the Forest Agency's guidelines are not binding,
- no criminal or other penalty applies in the event of non-compliance with the guidelines, and therefore no effective enforcement mechanism,
- the guidelines are not site-specific in that they do not contain any information on whether the protected species live in the area subject to felling,
- the Forest Agency had not examined whether the felling could be carried out fully in accordance with the prohibitions laid down in the ASF or the conditions specified in the guidelines,
- neither the felling notification nor the guidelines specify the time of year when the felling would be carried out,
- insofar as the area to be felled hosts the protected species, the removal of the forest will lead to the disappearance of part of the natural habitat of those species and will thus threaten their survival in the long term.

The CJEU held that the competent authority is required to *anticipate which activities could be harmful* to the species protected by the Habitats Directive, based on a *preventative approach* which takes account of the conservation needs of the species concerned. The authorisation of

activities pursuant to a FMP must be capable of anticipating the potential for harmful effects on species protected by the Habitats and Birds Directives, wherever they occur, and must involve binding, specific conditions and rules, enforceable with penalties, and subject to monitoring and supervision, to ensure that the approach meets the requirements of a system of strict protection for such habitats and species. The FMP approach to authorising recurring activities such as thinning and active forest management therefore requires a level of ongoing resources for the appropriate levels of supervision, monitoring and enforcement to ensure the strict protection of European sites and species[xxiii].

[xxiii] The Regulatory Review Report contains a recommendation that the FMP approach to authorising regular recurring activity be considered, subject to an evaluation of the resources necessary to ensure that this approach would fully comply with all EU environmental law obligations and objectives.

9 Strategic Environmental Assessment Directive

9.1 Key Points

The SEA Directive is concerned with ensuring that environmental considerations are integrated into public plans and programmes prior to their adoption in specific sectors including forestry.

The SEA Directive applies to plans or programmes relating to the forestry sector, where the term 'plans or programmes' should be interpreted broadly and may apply to regulations and designations of land for particular purposes, if the measure defines rules and procedures for later scrutiny, for example spatial or other criteria which may be relied upon in determining suitable locations for forestry. The precise scope of the SEA Directive and the obligation to assess alternatives is the subject of a pending Supreme Court appeal[118].

Where the Regulatory Review Report recommends the adoption of statutory instruments, or statutory guidance, setting out rules and standards and criteria for the purposes of streamlining forestry planning and decisions, it is assumed that SEA requirements will apply.

9.2 Overview and Objectives

The SEA Directive[119] is concerned with the integration of environmental assessment into plans and programmes at the earliest stage of their preparation and prior to adoption, and to ensure extensive public participation in governmental and public-body decision-making on plans and programmes.

Recital (4) of the SEA Directive notes that environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment, because it ensures that the effects of implementing the plans and programmes are taken into account during their preparation and before their adoption.

Recital (5) notes that the adoption of SEA procedures at the plan and programme level should provide a more consistent framework in which undertakings operate by the inclusion of the relevant environmental information into the decision-making procedures, leading to more sustainable and effective solutions.

9.3 Definition of 'plan' or 'programme'

Article 2(a) of the Directive sets out two cumulative conditions which must be satisfied before a plan will be considered a 'plan or programme' under the SEA Directive, namely:

- That the plan or programme is subject to preparation and/or adoption by an authority at national, regional, or local level or is prepared by an authority for adoption, through a legislative procedure, by a parliament or government, and

- That the plan or programme is required by legislative, regulatory, or administrative provisions.

Article 3(2) of the SEA Directive provides that an environmental assessment shall be carried out for all 'plans and programmes' which:

> (a) are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country

planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive: or

(b) which, in view of the likely effect on sites, have been determined to require an assessment (Appropriate Assessment) pursuant to Article 6 or 7 of the Habitats Directive.

The CJEU has held that the definitions of the types of plan or programme envisaged by the SEA Directive should be interpreted broadly, to give effect to the objective of the SEA Directive which is to give a high level of protection of the environment[120].

As noted by the EPA in its Good Practice Note on SEA for the Forestry Sector (2019)[121] SEA is essentially just good forward planning.

9.3.1 Plan or programme for a small area at local level

Article 3(3) provides that plans and programmes referred to in 3(2) which determine the use of small areas at local level and minor modifications to plans and programmes referred to in 3(2) shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

In Case C-444/15 *Associatzione Italia Nostra Onlus*[122] the CJEU held that '*small areas at local level*' means where the plan or programme is prepared or adopted by a local authority, as opposed to a regional or national authority, and the area inside the territorial jurisdiction of the local authority to which the plan or programme relates is small relative to that territorial jurisdiction.

A forestry management plan adopted by a public authority at a local or catchment level might therefore be exempted from the requirement for SEA, based on its small scale and local level, but this is conditional on there being no likely significant effect on the environment, which means there must be SEA Screening even of small-scale plans and programmes. A Member State may not set a quantitative threshold to exempt an entire class of plan or programme from the SEA requirements, where one or more such projects would be likely to have significant effects on the environment[123].

In Case C-160/17 *Thybaut and Others*[124] the CJEU held that SEA applied to legislation which designated an area for fast-tracked development consent applying a derogation from the standard requirements under the previously adopted land use plan for the area (which was subject to SEA). For example, any designated 'go to' area for forestry would be subject to prior SEA Screening and SEA if significant environmental effects are likely. That individual projects within the designated area would also be subject to EIA Screening and/or AA or AA Screening does not preclude an obligation to carry out plan-level SEA. An EIAR under the EIA Directive cannot be used to circumvent the obligation to carry out the assessment under the SEA Directive, where required[125].

In *Kerins v An Bord Pleanála & Others*[126] the High Court has referred several questions to the CJEU for a preliminary ruling on the interpretation of the SEA Directive, including whether a non-statutory local site 'masterplan' jointly prepared by adjoining landowners (one of which is a local authority) constitutes a 'plan or programme' subject to SEA.

9.3.2 Other plans or programmes which set the framework for future development consent

Article 3(4) provides that Member States shall determine whether plans and programmes, other than those referred to in 3(2), which set the framework for future development consent of projects, are likely to have significant environmental effects.

In Case C-24/19 *A and Others*[127] the CJEU held that the concept of a plan or programme which sets the framework for future development consent relates to any measure which establishes *a*

significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment, by defining rules and procedures for scrutiny applicable to the sector concerned.

In Case C-671/16 *Inter-Environnement Bruxelles and Others*[128] the CJEU held that '*a significant body of criteria and detailed rules*' must be understood qualitatively, so as to avoid strategies which may be designed to avoid the obligations laid down in the SEA Directive by splitting measures, and these requirements apply not only to the initial preparation and adoption of a plan or programme, but also to their modification insofar as it is likely to have a significant effect on the environment.

In Case C-300/20 *Bund Naturschutz in Bayern eV*[129] the CJEU considered that a German Regulation (the Inntal Süd Regulation) did not set the framework for future development consent, and therefore did not fall within the concept of a 'plan or programme' under the SEA Directive. The Regulation established provisions for the designation of landscape conservation areas, prescribing rules for activities, such as ploughing, grazing, fertilising or otherwise converting meadows, felling or otherwise removing individual trees, hedges, hedgerows etc (other than in woodlands), to clear forest stands in full or in part, or initial afforestation, or clear-cutting of more than 0.5ha, or converting deciduous or mixed forests into predominantly coniferous forests etc, to require prior authorisation and assessment. Such activities would not ordinarily require consent, outside of designated landscape conservation areas. The Regulation further provided that, within a landscape conservation area, any activity which has the effect of altering the character of that area or which runs counter to the conservation objective pursued by the Regulation, shall be prohibited. A permit may only be permitted provided that the intended measure does not produce any such effect or provided that any such effect can be offset by ancillary provisions.

The CJEU was satisfied that, as the Regulation was adopted by the local authority, it met the first condition to constitute a 'plan or programme' as defined. As regards the second condition, the CJEU held that plan or programme must be regarded as 'required' where there exists, in national law, a particular legal basis authorising the competent authorities to adopt that plan or programme, even if such adoption is not mandatory[130]. The CJEU found that the Regulation in this case was adopted pursuant to a legislative measure and that the second condition was therefore satisfied. The activities subject to the Regulation included activities in the sectoral areas covered by the SEA Directive, and some of the activities were of a type listed in Annex II of the EIA Directive.

Ultimately the CJEU found that the Regulation did not meet the test laid down in Case C-24/19 *A and Others* because it did not relate to a measure which establishes a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment, by defining rules and procedures for scrutiny applicable to the sector concerned. Accordingly, the CJEU found that the Regulation, whilst having a certain influence on the location of projects (for example by making it harder to implement them within the landscape conservation area than in other areas) does not set the framework for future development consent. The CJEU made the same finding with respect to Article 3(4).

In Case C-43/18 *Compagnie d'entreprises CFE SA*[131] the CJEU did not rule out the possibility that a measure designating a special area of conservation under the Habitats Directive could constitute a 'plan or programme' under the SEA Directive, where it lays down specific criteria and rules in relation to future development consent, but on the facts of the case before it, found that the measure did not meet all of the conditions of a 'plan or programme' under the SEA Directive. The CJEU also held that where a plan or programme sits within a hierarchy of plans and programmes, a Member State may form the view that the lower tier plan or programme does not require SEA where the upper tier plans or programmes have been subject to an SEA of sufficient scope to cover all likely significant effects on the environment.

9.4 Consideration of Alternatives

Article 3(1) of the SEA Directive requires that, when carrying out SEA, the competent authority shall identify, describe, and evaluate *inter alia* the reasonable alternatives taking *into account the objectives and geographical scope of the plan or project* in the environmental assessment.

In *Friends of the Irish Environment CLG (National Development Framework)*[132], the Applicant successfully argued before the Court of Appeal that, where SEA is required, the environmental report must include an assessment of the preferred option and of the reasonable alternatives considered. The assessment of the preferred and reasonable alternative options should be done on a comparable basis. In effect, an SEA is required for each reasonable alternative in addition to the preferred option. This is different to the EIA Directive, which only requires an EIA of the selected project, but requires a consideration of the reasonable alternatives from an environmental perspective.

The SEA determination must give the reasons why the reasonable alternative options were not selected as the preferred option. The Court of Appeal found, on the particular facts, that a comparable SEA had been carried out of the reasonable alternative options and the preferred option in relation to the NPF, and the Applicant has been granted leave by the Supreme Court to appeal this judgment[133].

The Court of Appeal's reasoning is based on a purposive interpretation of the SEA Directive, European Commission Guidance on the SEA Directive (which the Court determined to be persuasive, if not binding on the Court), and on UK Court decisions which had reached a similar conclusion.

9.5 SEA Regulations relevant to Forestry

The EC (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (SI 435/2004) as amended (SI 200/2011) are applicable to forestry plans and programmes. Schedule 1 of SI 435/2004 sets out screening criteria for determining whether a proposed plan or project (or modification to a plan or project) is likely to have significant effects on the environment. When carrying out screening of plans and programmes for SEA, it is necessary to apply each of these screening criteria, even for plans and programmes of a small scale at a local level.

Recommendations in the Regulatory Review Report for the adoption of statutory instruments / statutory guidance for the purposes of streamlining the licensing system presuppose that all such measures will be subject to prior SEA Screening, in accordance with the SEA Regulations.

10 Assessment and Protection of Landscape

10.1 Key Points

Forestry has the potential to have significant environmental effects on the landscape. Effects can be both positive and negative. The National Landscape Strategy outlines certain actions to be taken for the purposes of conserving and maintaining landscapes and their positive contribution to the environment. It seems, however, that not all the specified actions have been completed. The European Landscape Convention, to which Ireland is a party, incorporates guidelines for the preparation of Landscape Character Assessments. It appears that there is no national landscape character assessment in Ireland.

Landscape is a feature of the environment which is likely to be vulnerable to the cumulative effects of multiple forestry projects, even where no individual project is likely to have a significant environmental effect on its own. Landscape is a key consideration under the Planning Acts, the Forestry Acts, and also in the context of SEA and EIA.

10.2 European Landscape Convention

The European Landscape Convention (ELC)[134] is an international treaty dedicated to the protection, management and planning of all landscapes in Europe. The Convention came into force on 1 March 2004. Ireland is a signatory to the ELC.

The ELC covers natural, urban, peri-urban, and rural areas, encompassing land, inland water, coastal and marine areas. It accounts for every-day and degraded landscapes, as well as those considered to be outstanding. Article 6 of the ELC requires signatory States to identify landscapes and analyse their characteristics and values including the forces and pressures transforming them.

The ELC is subject also to guidelines[135]. The ELC acknowledges that certain human activities including agriculture and forestry can have significant landscape implications, which may be positive, negative, or neutral.

10.3 National Landscape Strategy for Ireland 2015-2025

The National Landscape Strategy of Ireland aims to implement the ELC by providing for specific measures and actions to promote the protection, management and planning of the landscape. The National Landscape Strategy consists of six core objectives which aim to;

- Recognise landscapes in law
- Develop a National Landscape Character Assessment
- Develop Landscape Policies
- Increase Landscape Awareness
- Identity Education, Research and Training Needs
- Strengthen Public Participation

10.3.1 Recognise Landscape in Irish law

Pursuant to the National Landscape Strategy, a legal definition of 'landscape' which corresponds with the ELC definition was incorporated into section 2 of the Planning and Development Act 2000, as amended[136].

'Landscape means an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors' (Article 1.a)

The National Landscape Strategy commits to the examination of other legislation and codes to identify gaps to be addressed. It is unclear whether this has been done. The Forestry Act 2014 addresses Landscape in the following manner:

- The definition of "good forestry practice" is forestry practice respecting the principle that diverse activities constituting forestry (including afforestation) must be planned and implemented in a manner that prevents, limits, abates or reduces significant adverse impacts or risks thereof on, inter alia, *the character of the landscape*.

- Section 32 of the Act provides that, where a compensation mechanism is established for licence refusals, compensation would not be payable where the proposed project is not consistent with good forestry practice.

The Planning Acts address landscape as follows:

- The **National Planning Framework – Project 2040,** is required by section 20C(2) to address certain matters including the conservation of the landscape and archaeological, architectural, and natural heritage.

- **Regional Spatial and Economic Strategies** are required by Section 23(2)(c) to address '*landscape, in accordance with relevant policies or objectives for the time being of the Government or any Minister of the Government relating to providing a framework for identification, assessment, protection, management and planning of landscapes and developed having regard to the European Landscape Convention'*.

- **County Development Plans** are required by Section 10 to include objectives for:

  "(ca) the encouragement, pursuant to Article 10 of the Habitats Directive, of the management of features of the landscape, such as traditional field boundaries, important for the ecological coherence of the Natura 2000 *network and essential for the migration, dispersal, and genetic exchange of wild species.*

  "(e) the preservation of the character of the landscape where, and to the extent that, in the opinion of the planning authority, the proper planning and sustainable development of the area requires it, including the preservation of views and prospects and the amenities of places and features of natural beauty or interest.

  "(p) landscape, in accordance with relevant policies or objectives for the time being of the Government or any Minister of the Government relating to providing a framework for identification, assessment, protection, management and planning of landscapes and developed having regard to the European Landscape Convention *done at Florence on 20 October 2000."*

- **Landscape Conservation Areas,** may be made by local authorities pursuant to section 204, and the Minister may prescribe classes of development that would not be 'exempted development' within those areas[137].

- **Tree Preservation Orders**, may be made under section 205, and linked to a landscape conservation measure, prohibiting the felling, topping, lopping, or wilful destruction of any trees. A Tree Preservation Order would not preclude the removal of trees or parts of trees which are dead, dying, or have become dangerous, or the cutting down of trees in compliance with an obligation imposed by or under another legislative scheme, or so far as it may be necessary to prevent or abate a nuisance or hazard.

10.4 SEA and Landscape

SEA Screening Criteria include "*the characteristics of the effects and of the area likely to be affected, having regard to inter alia the effects on areas or landscapes which have a recognised national, Community, or international protection status*."

10.5 EIA and Landscape

Recital (16) of the EIA Directive (as inserted by Directive 2014/52/EU) expressly refers to and incorporates the landscape definitions from the ELC, and notes that, *in order to better preserve historical and cultural heritage and the landscape, it is important to address the visual impact of projects, namely the change in the appearance or view of the built or natural landscape and urban areas, in environmental impact assessments*.

Initial afforestation, deforestation, and roads, all constitute 'projects' covered by the EIA Directive.

Annex III EIA Screening criteria include whether the location of the project is sensitive having regard, *inter alia*, to *landscapes and sites of historical, cultural, or archaeological significance.*

Landscape is also a feature of the environment which is likely to be vulnerable to cumulative effects of multiple projects which, individually, may not be significant but which cumulatively, may have a significant effect on the landscape of an area.

Annex IV information to be included in an EIAR includes a description of all aspects of the environment likely to be significantly affected, including *landscape*.

11 Aarhus Convention

11.1 Key Points

The Aarhus Convention confers public participation rights to the public in relation to environmental decision-making involving SEA, EIA and AA. Opportunities to participate must occur early in a decision-making process, at a time when participation can be effective in influencing the process. To be effective, public participation procedures must ensure that the public has access to information, that there are reasonable periods for each stage in the decision-making procedure, that notice is given, and an opportunity to be heard.

The CJEU has determined that the Aarhus Convention right to participate applies to the AA procedure, where there are likely significant effects on a European site. SI 293/2021 provides for public participation following an AA Screening Determination that an AA is required. This has the consequence of producing multiple consultation procedures on a single application, however the later consultation facilitates access to the technical advice received by the Minister from prescribed bodies, on which members of the public concerned may comment.

The Aarhus Convention incorporates a duty to give reasons for the decision, having had due regard to the submissions and observations of the public. This statutory duty to give reasons and considerations is found in the Forestry Act 2014 and the Forestry Regulations 2017.

11.2 Objectives

The Aarhus Convention[138] is concerned with ensuring access to information on the environment, public participation in environmental decision-making, and cost-effective access to justice in environmental matters. Article 1 of the Convention guarantees these rights to individual members of the public and the public concerned.

The Aarhus Convention is incorporated into European law by *inter alia*

- the Access to Information on the Environment Directive[139],
- the Public Participation Directive[140], and
- the SEA and EIA Directives, and the Industrial Emissions Directive[141].

Article 3 of the Convention sets out some binding principles, which can be applied to the forestry regulatory framework as follows:

- Primary and secondary legislation and any binding statutory guidance should be consistent with the rights conferred and obligations imposed by the Aarhus Convention.
- The rights and obligations should be subject to adequate enforcement.
- State actors such as Government Departments should facilitate public access to environmental information, to provide guidance on public participation, and to provide information on exercising rights of access to justice, including rights of appeal.
- Awareness campaigns should be implemented to explain to the public how to access information, participate in environmental decision-making, and seek access to justice in environmental matters.
- Environmental Non-Governmental Organisations (E-NGOs) and environmental groups should be recognised and supported in their work.
- No person, whether an E-NGO or a member of the public, should be in fear of penalty, persecution, or harassment for exercising Aarhus Convention rights.

11.3 Public Participation

Aarhus Convention public participation rights are already incorporated into the SEA and EIA Directives, for plans and programmes, and projects, covered by those Directives.

Public participation rights are not incorporated into the Habitats Directive or the Birds Directive. For example in the context of AA under Article 6(3), "*the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public*."

In Case C-243/15, *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín ('LZ')* the CJEU held that Article 6(3) "*must be read in conjunction with Article 6(1)(b) of the Aarhus Convention"*.

Article 6(1)(b) provides that public participation rights apply to activities listed in Annex I, and to *any other activity likely to have a significant effect on the environment*. Consequently, where AA is required because the proposed plan or programme is likely to have significant effects on a European site, public participation rights would apply pursuant to Article 6(1)(b).

In Case C-463/20 *Namur-Est Environnement ASBL* the CJEU held that where the Article 16 derogation decision under the Habitats Directive is part of the development consent procedure of a project under the EIA Directive, there is no public participation requirement in relation to the derogation process, so long as the public can participate effectively in the subsequent development consent procedure under the EIA Directive.

In *Hellfire Massy* the High Court has referred several questions to the CJEU for a preliminary ruling, including whether the derogation procedures under Article 16 of the Habitats Directive and Article 9 of the Birds Directive incorporate a requirement for public participation.

11.4 Public Notice Requirements

Public notice of plans or projects or proposed activities subject to the Aarhus Convention public participation rights should ensure that members of the public are informed *early* in the decision-making procedure, and in an adequate, timely and *effective* manner, of at least the following information:

- the proposed activity and the application;
- the possible decisions;
- the decision-maker;
- the envisaged procedure, including, *as and when this information can be provided*:
    - (i) the commencement of the procedure;
    - (ii) the opportunities for the public to participate;
    - (iii) the time and venue of any envisaged public hearing;
    - (iv) an indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
    - (v) an indication of the relevant public authority or any other official body to which comments or questions can be submitted *and of the time schedule for transmittal of comments or questions*; and
    - (vi) an indication of what environmental information relevant to the proposed activity is available; and
- the fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

11.4.1 Effective public notice in the forestry sector

Regulation 10(1) of the Forestry Regulations 2017 provides for public notices of all applications and decisions under the Forestry Act 2014, on the DAFM website.

In *McCaffrey v Minister for Agriculture Food and Marine*[142] the Court of Appeal observed that the DAFM website comprised a "*relentless list of afforestation applications and approvals*" and that "*the farmer who spent his time scouring the Minister's website … would have ceased to be a farmer in all but name, for he would have little time left for farming*".

At paragraph 39 the Court of Appeal noted that:

> "*unless one actually knew that one should look for a pending application on the Minister's website, the very fact of publication would be ineffective to ensure timely notice to persons who might otherwise be affected by the afforestation proposal.*"

At paragraph 42 the Court held that

> "*Elementary fairness required that persons potentially affected by such proposals – such as home-owners and land-owners living in the immediate vicinity – had timely and effective notice of such proposals, by, for example, something like a site notice requirement. Mere publication in itself – and I stress these words – of a notice of an application on the Minister's website would not suffice for this purpose.*"

The DAFM website remains the primary means of notifying the public of all types of application, particularly felling licence applications, and it is also how DAFM notifies the public, including the public concerned who have already made a submission or observation on the initial application, of a decision to carry out AA on a licence application pursuant to SI.293 of 2021.

11.4.2 Site Notices for Forestry

An afforestation licence application, and a forest road licence application, must be preceded by a site notice erected pursuant to Regulation 11 of the Forestry Regulations. This is consistent with the public participation requirements under the EIA Directive, and these two types of application are covered by the EIA Directive.

Site notice of the granting of a felling licence occurs after the grant, not prior to the application, under Regulation 4 of the Forestry Regulations. Further consideration may need to be given to whether this is consistent with the Aarhus Convention public participation requirements, which will apply whenever AA is required.

11.4.3 Pre-application consultation (whether statutory or non-statutory)

Public participation must occur early when all options are open and effective public participation can take place. This "all options open" requirement, which is reflected also in the EIA Directive, was considered by the Irish Supreme Court in the context of the mandatory pre-application procedure for substitute consent quarry applications, in *An Taisce v An Bord Pleanála, Ireland and the Attorney General, and Sharon Browne*[143]. The statutory pre-application consultation procedure excluded the public. The Supreme Court held that this was consistent with public participation rights, so long as all options remained open for consideration at the substantive application stage. The Court held that the public participation requirements are concerned with affording members of the public with an opportunity of participating in the process at a time and in a way when it has the capacity to influence matters, certainly those critical to the decision – '*when all options are open'*.

11.4.4 Timing of distinct phases of the public participation procedure

Article 6 requires that the public are given adequate time in which to make submissions and observations on an application, and that the different stages in the procedure should be outlined, including timelines, as this provides certainty for the public in relation to when they can participate.

The initial consultation period, under section 10(4) of the Forestry Act 2014, provides that the public may make submissions on an application *within 30 days* of publication of the application (DAFM website). However, where EIA is required, Article 6(7) of the EIA Directive provides that the public consultation shall be *at least 30 days* from the date of publication of the notice. Where AA is required, SI 293 of 2021 provides that the public may make submissions on the matter *within 30 days* of publication of the notice (in this instance, on DAFM website).

Where a request for further information is made, irrespective of whether such request is made in the context of EIA or AA, the Forestry Act provides that the public may make submissions on the further information received within a period of *at least 30 days.*

For some applications there will only be one consultation of up to 30 days. For applications requiring AA, or a request for further information, there will be more than one consultation and the application procedure will be extended accordingly, from 30 to 60 days, or possibly 90 days, plus such additional period as may be necessary to fully assess and determine the application.

Difficulties can arise where significant new information is provided by an applicant, whether unsolicited or in response to a request for further information. Whether a further public participation procedure is necessary will depend on the materiality of the new information, whether it could impact on the rights and concerns of other persons, and whether it introduces new EIA or AA information in relation to which public participation rights apply. Where one party introduces a new element of substance by way of further information or submission which might affect the outcome, the High Court has indicated that fair procedures would demand that the party affected be given an opportunity to respond[144]. This has the potential to lead to "*endless ping-pong sequence of exchanges between the parties*" which can cause delay and frustration. A "*process of "ping-pong""* is always a risk if one allows anything further to be put in, and notwithstanding that "*the process of sur-reply and sur-rejoinder"* will eventually peter out[145]. Appropriate controls need to be put in place to balance the need for fairness and due process, with the need for a streamlined and efficient decision-making procedure.

11.4.5 Access to information

Article 6 of the Aarhus Convention requires that the public concerned shall be given access for examination, upon request where so required under national law, free of charge, and *as soon as it becomes available*, to all information relevant to the decision-making procedure *that is available at the time of the public participation*.

Where an application does not require AA, the public are typically consulted as soon as an application is validated. The application documents are made available, but the advice received from statutory prescribed bodies on that application is typically not available at the time of that initial public participation procedure.

New AA procedures introduced by the Minister for Heritage under SI 293/2021 generate additional public consultation requirements where an AA Screening determination is made that AA is required due to likely significant effects on a European site. Consequently, a further public consultation procedure may be undertaken at a point at which the advice to the Minister from prescribed bodies are available for inspection and comment.

11.4.6 Right to Reasons

Article 6 of the Convention provides that the public may submit any comments, information, analyses, or opinions that they consider to be relevant to the proposed activity, and *due account must be taken* of the outcome of the public participation in the decision-making procedure. The giving of reasons is therefore a critical step in demonstrating compliance with the Aarhus Convention, the EIA Directive, and the Habitats Directive.

Under the Forestry Act 2014, section 7(3) provides that the Minister *shall provide reasons and inform the applicant of the procedure for appealing the decision.* Regulation 21(1)(b) of the Forestry Regulations 2017 (SI. 191/2017) goes a bit further, by providing that the Minister shall give the main reasons and considerations on which the decision to grant or refuse the licence is based, and where conditions are attached to any licence, the reasons for the conditions.

In *Connelly v. An Bord Pleanála*[146], with respect to a similar statutory duty under the Planning and Development Act 2000, as amended, the Supreme Court held first, that a person affected by a decision is entitled to know in general terms why the decision was made, and second, that they are entitled to have enough information to consider whether they have any grounds of appeal or grounds for judicial review (and to allow any appeals body or Court to consider the validity of the decision). The information on the decision must be sufficient to enable an "outsider" to exercise their right to seek a review of the decision, even if they did not participate in the decision-making process prior to the decision. Reasons can be found not only in the text of the decision itself, but also from other sources mentioned in the decision, or clearly relied upon in the decision.

In *Balz v An Bord Pleanála*[147] the Supreme Court observed that*: "[i]t is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."*

In *Balscadden v An Bord Pleanála*[148] the High Court noted the Supreme Court comments in *Balz* and reaffirmed that the obligation is to provide broad reasons on the main issues, not micro-specific reasons addressing each and every detail of a submission in a narrative, discursive correspondence. Reasons can be grouped thematically, they do not have to be set out in a single document or in the decision itself so long as they are readily discernible in another identified document. The adequacy of reasons in any set of circumstances will depend on the context and should be judged from the standpoint of an intelligent person who has participated in the procedure and is appraised of the broad issues involved.

In *Ballyboden Tidy Towns v. An Bord Pleanála*[149] the High Court held that "*one, though not at all the only, yardstick of what is a "main" issue is whether it is an issue "upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests*". That is similar to the concept of a *materiality* in planning law. It seems as though issues relating to conflict over the existing and proposed use of land is a "main" issue on which reasons ought to be given[150].

12 Climate Law and the European Green Deal

12.1 The European Green Deal

Tackling climate change is one of the European Commission's top priorities and the European Green Deal[151] is its ambitious plan to transform Europe into the first climate-neutral continent. The European Green Deal includes policies aimed at reducing emissions, preserving Europe's natural environment, and investing in cutting-edge research and innovation to tackle climate change. It sets out a roadmap for making the EU's economy sustainable by turning climate and environmental challenges into opportunities across all policy areas that will result in jobs and economic growth. It outlines investments needed and financing tools available. The European Green Deal covers all sectors of the economy, namely transport, energy, agriculture, buildings, and industries such as steel, cement, ICT, textiles, and chemicals.

12.2 The European Biodiversity Strategy for 2030

A key pillar of the European Green Deal is the EU Biodiversity Strategy for 2030[152] which is an ambitious long-term plan for protecting nature and reversing the degradation of ecosystems. The strategy aims to put Europe's biodiversity on a path to recovery by 2030 and contains specific actions and commitments. In particular, the EU biodiversity strategy for 2030 commits to planting at least 3 billion additional trees in the EU by 2030 in full respect of ecological principles.

Forests and the forest-based sector are identified by the European Commission as an essential part of Europe's transition to a climate neutral economy. Trees are seen as key to the solution to combat climate change and biodiversity loss – their 'triple role', as carbon sinks, storage, and substitution, contributes to the reduction of greenhouse gas emissions in the atmosphere, whilst ensuring that forests continue to grow and provide many other ecological, recreational, and other services.

12.3 EU Forest Strategy for 2030

The EU Forest Strategy for 2030[153] is anchored in the European Green Deal and builds on the EU biodiversity strategy for 2030. The Forest Strategy recognises the central and multi-functional role of forests, and the contribution of foresters and the entire forest-based value chain for achieving by 2050 a sustainable and climate-neutral economy while ensuring that all of ecosystems are adequately protected. The intention of the Forest Strategy is to contribute to achieving the EU's greenhouse gas emission reduction target of at least 55% in 2030 and climate neutrality by 2050, as enshrined in the EU Climate Law.

The Forest Strategy proposes new EU legislation on EU Forest Observation, Reporting and Data Collection to ensure a coordinated collective approach across the EU. This would underpin a legal obligation that all Member States prepare one or more Strategic Plans for Forests. Engagement since the Forest Strategy was published suggests that there is not uniform agreement across all EU Member States in favour of such an approach, however on 5 November 2021 the European Council approved draft conclusions on the New EU Forest Strategy for 2030[154].

One of the central elements of the Forest Strategy and the approved conclusions of the Council is a proposed legislative approach to the preparation of strategic Forest Management Plans in each Member States, and the undertaking of a comparative assessment of those plans with the potential for additional criteria to be applied by the Commission to ensure that the plans meet the objectives of the Forest Strategy.

In 2014, Ireland adopted the document '*Forests, products and People – Ireland's forest policy, a renewed vision*' and the Forestry Programme 2014-2020 (extended until the end of 2022)[155].

The National Planning Framework – Project Ireland 2040[156] states:

> *"As the quality of land is often a determining factor in the land-use decision-making process, lower quality land that currently presents challenges for economic agriculture may represent a resource that might be used for afforestation. It is likely that forest cover will continue to focus on suitable agricultural land which may be easier to convert to afforestation owing to more limited agricultural use. The afforestation of agricultural land, supported by Government incentives, aims to increase long-term timber supply to support the development of a sustainable processing sector and offers significant carbon sequestration potential, thereby contributing to national greenhouse gas mitigation targets and the bio-economy. … Increased planting and the attainment of afforestation targets will depend on the availability of land in general and, specifically, a change in land use from agriculture to forestry."*

There is, however, no national Forest Management Plan, or other similar plan with a spatial element.

Danish primary legislation for forestry incorporates an overall goal to increase afforestation to 25% of the land area coverage within a "tree generation" (75 years). The Finance Act contains a commitment to prepare and adopt a Danish national Forest Plan by the end of 2022. Scottish primary legislation requires the Scottish Ministers to prepare a forestry strategy (Forestry Strategy 2019-2029) setting out a 10-year plan and a 50-year vision, for the expansion and management of forestry. There is separate provision for a Land Use Strategy, not specific to forestry, which sets out policies for sustainable land use including increased woodland and urban forestry. Scotland does not currently have a National Forest Plan setting out spatial criteria or land use objectives for forestry, although local and regional development plans incorporate certain forestry objectives. There are further Local and Regional Woodland Creation Strategies and Projects, with yearly planting targets.

12.4 European Climate Law

The EU Climate Law[157] acknowledges that "*The existential threat posed by climate change requires enhanced ambition and increased climate action by the Union and the Member States."* (Recital 1).

The European Climate Law puts into law the goals set out in the European Green Deal for Europe's net zero greenhouse gas emission by 2050 (the Climate Neutrality Objective). The Climate Law also sets the intermediate target of reducing greenhouse gas emissions by at least 55% by 2030 (the Intermediate Climate Target). The EU Institutions and the Member States, including Ireland, are bound to take the necessary measures at EU and national level to meet both the Intermediate Climate Target and the Climate Neutrality Objective, whilst considering the importance of promoting fairness and solidarity among Member States. These targets require immediate action on the part of each Member State.

The Climate Law includes measures to keep track of progress and adjust the actions accordingly. These measures are based on existing systems, such as: the Governance Process for Member State's national energy and climate plans, regular reports by the European Environment Agency and the latest scientific evidence on climate change and its impacts. Progress will be reviewed every five years, in line with the global stocktake exercise under the Paris Agreement.

Recital (23) of the EU Climate Law provides:

The restoration of ecosystems would assist in maintaining, managing, and enhancing natural sinks and promote biodiversity while fighting climate change. Furthermore, the 'triple role' of forests, namely, as carbon sinks, storage and substitution, contributes to the reduction of greenhouse gases in the atmosphere, while ensuring that forests continue to grow and provide many other services.

12.5 EU Nature Restoration Law

The European Commission has adopted a Proposal for a Regulation on Nature Restoration[158]. It is intended that, when adopted, the Nature Restoration Regulation will require Member States to submit plans for the restoration of habitats within two years, incorporating an implementation plan. Ultimately this should force Member States to take such steps as are necessary to restore damaged and threatened habitats, including forests and bogs, thereby improving the resilience of areas for the benefit of future projects.

12.6 Land Use, Land Use Change and Forestry Regulation

The EU Climate Law expressly acknowledges the important role that Land Use and Land Use Change and Forestry (LULUCF) can play within the measures to be adopted by each Member State.

The LULUCF Regulation[159] was adopted to give effect to parts of the EU's commitments under the Paris Agreement, to contributions from certain land use sectors towards achieving the objectives of the Paris Agreement and the emissions reductions targets for 2021-2030. It lays down rules for the accounting and reporting of emissions and removals and for checking each Member State's compliance with those commitments. It is recognised that the sustainable management of land and land use has a key climate action role, and that grassland, hedgerows, forests, soils, and peat can sequester or absorb CO_2 emissions, acting as 'sinks', but also depending on how they are managed, having the potential to result in significant emissions.

Ireland is obliged under the LULUCF Regulation to account for emissions and removals associated with: Forest land, Cropland, Grassland, Wetlands, Settlements, and Other Land uses. Forests provide greater levels of CO_2 sequestration functions as they mature and grow but can also represent a source of CO_2 emissions when harvested. The climate impact of harvesting will depend on the use to which the wood is put; for example, where it displaces more carbon-intensive building materials, it will likely have a positive climate impact, particularly if replacement planting is carried out to maintain the lifecycle of the forest.

Land drainage is also a potentially significant source of emissions, whereas the creation of wetlands is a sink. The alteration of peatlands to grass or forestry can lead to significant loss of CO_2. In general, therefore, sustainable land management should aim to preserve and enhance areas that have active CO_2 uptake in soils and biomass and reduce or eliminate areas that are a source of CO_2 emissions.

The LULUCF Regulation defines 'afforested land' as land that was previously cropland, grassland, wetlands, settlements or other land that has been converted to forest land, where a 'forest' means an area of land defined by the minimum value for area size, tree crown cover, or an equivalent stocking level, and potential tree height at maturity at the place of growth of the trees, as specified for each Member State in Annex II (see below for Ireland).

Afforested land includes an area that normally forms part of the forest but on which there are temporarily no trees as a result of human intervention, such as harvesting prior to replanting, or as a result of natural causes, but which can be expected to revert to forest, for example through a replanting / continuous forest cover obligation. In this context, '*managed forest land*' includes land reported as forest land remaining forest land, whereas 'deforested land' is land previously reported

as forest land which has been converted to cropland, grassland, wetlands, settlements, or other land uses.

In Ireland's case, the conversion of 0.1ha of land, with 20% tree crown cover, and trees to the height of 5m, shall constitute 'afforested land' under the LULUCF Regulation. This is outlined in Annex II which prescribes minimum values for area size, tree crown cover and tree height parameters for each Member State. For example:

Member State	Area (ha)	Tree crown cover (%)	Tree height (m)
Ireland	0,1	20	5
Belgium	0,5	20	5
Denmark	0,5	10	5
United Kingdom	0,1	20	2

Afforested land: LULUCF Regulation 1

12.7 Ireland's Climate Law

The European Climate Law is implemented in Ireland primarily through the Climate Action and Low Carbon Development Act 2015 as substantially amended by the Climate Action and Low Carbon Development (Amendment) Act 2021, which commenced on 7 September 2021[160]. The Climate Act commits Ireland to the intermediate 2030 and 2050 targets prescribed by the EU Climate Law and identifies the specific mechanisms, plan and strategies that will be used by Government to achieve the targets. These measures include:

- a series of carbon budgets;
- sectoral emission ceilings;
- annual updates to the Climate Action Plan;
- a National Long Term Climate Action Strategy; and
- a National Adaptation Framework.

The Act establishes the Climate Change Advisory Council (CCAC) on a stronger legislative footing and confers on it the power to prepare proposed carbon budgets for Government. A carbon budget represents the total amount of greenhouse gases that may be emitted in the State during a 5-year period, measured in tonnes of carbon dioxide equivalent. The first proposed carbon budget programme (comprising three successive 5-year carbon budgets) was prepared by the CCAC and submitted to Government in late 2021 and is the subject of ongoing public consultation.

In the preparation of the proposed carbon budget programme the CCAC acknowledges the Government's intention to utilise the mechanisms under the LULUCF Regulation, to robustly measure and incentivise action across several sectors. The CCAC note that significant levels of afforestation and other land use changes are required to achieve the national climate objectives[161].

Currently activities coming within the scope of the LULUCF Regulation are a significant source of emissions, whereas they have the potential to constitute a significant carbon sink if managed appropriately. Historic patterns of afforestation combined with a slow-down of afforestation rates in recent years will result in the forestry sector becoming a net contributor to emissions in the coming years. If afforestation can be increased, rapidly and continuously, over time (and particularly beyond 2030) the forestry sector can have a positive impact as a carbon sink.

The biological nature of the emissions and removals from LULUCF introduces high levels of uncertainty into the assessment of progress towards targets which are not seen with other sectors and sources. Recent IPCC reports highlight the potential for *unintended* adverse impacts of changes in land use on biodiversity, water quality and other ecosystem services. The CCAC note, therefore, that it is critical that any actions initiated to reduce emissions from land use, or to enhance removals, avoid unintended adverse outcomes[162].

The CCAC advises that land use targets should be framed in terms of absolute activity levels (e.g., acreage of afforestation as a target) rather than in terms of potential emissions reductions. The target should be calculated based on the required mitigation to achieve the national climate objective by 2050, consistent with the National Biodiversity Action Plan. Afforestation today will take at least a decade or more to positively contribute to meaningful sequestration of CO_2, as trees require a degree of maturity before they can fulfil that function. The CCAC advice to Government is that consistent afforestation rates of between 13,000 to 16,000 hectares per annum will be required to ensure sufficient removals in an optimistic scenario by 2050, depending of course on all other sectors contributing their part as required. The CCAC indicate that afforestation levels like this would be consistent with a national target of 18% forest cover by 2050. This would constitute a significant increase from the current approximately 11% coverage[163].

12.8 Land Use Review

To maximise the potential contribution from land use as a climate mitigation measure, it would be ideal to identify optimal land use options based on evidence from a Land Use Review, Phase 1 of which has commenced by the EPA, on the environmental, ecological, and economic characteristics of land types across Ireland. The EPA's call for evidence to support the Land Use Review[164], stated:

> *Land use has often been viewed through the lens of the individual land-based sectors that contribute to our economy, like agriculture, housing, and forestry. But our land delivers so much more to us as a society including supporting our ecosystems, it connects us to our history, it provides opportunities for recreation, and delivers thrilling and familiar landscapes. In Ireland, land is intimate to our concept of 'place'.*
>
> *Our land is a precious resource and fundamental to our economy, our environment, and our wellbeing as a nation: the way we own, use and manage our land is fundamental to how we live. As such we need to take a holistic systems approach to our use and management of land to enable us to balance the many demands that are placed on it in particular as we face the complex challenges of climate change and biodiversity loss.*

The EPA intend to identify:

- The impact of current land use of the environment and on society
- The appropriate indicators for the purposes of measuring land use impacts
- Trends that will impact on land use
- Stakeholders
- Existing commitments and targets impact on land use decisions currently
- Practices around land use that are demonstrably beneficial to environment and society

This ongoing project is outside the parameters of the regulatory review of the forestry licensing regime but is likely to be relevant to the long-term strategic planning of future afforestation. It is identified as a key objective in the current Programme For Government, and in the Climate Action Plan 2021. The Climate Act 2015-2021 requires the Government and its Ministers to take such steps as are necessary to give effect to the objectives and actions outlined in the Climate Action Plan 2021.

12.9 Climate Action Plan 2021

The Climate Action Plan 2021 is now on a statutory footing under the 2021 Act. It sets out a roadmap to deliver on Ireland's climate neutrality objective as required by the 2021 Act. The Climate Action Plan lists the actions needed to deliver on Ireland's climate targets and sets indicative ranges of emissions reductions for each sector of the economy. It will be updated annually, including in 2022, to align with the legally binding economy-wide carbon budgets and sectoral ceilings that will be adopted in the coming months.

The Climate Action Plan states that "***Afforestation is the single largest land-based climate change mitigation measure available to Ireland***." This is clearly acknowledged by the advice of the CCAC to the Government on the first carbon budget programme. Given all forests planted in the coming decades will be critical for achieving carbon neutrality no later than 2050, it is essential that substantial afforestation to reach the targets takes place in this decade.

The Climate Action Plan 2021 states:

> *"Ireland's land use, land use change and forestry sector is currently a carbon source rather than a carbon sink. To reduce emissions and move to being an overall store of carbon, will involve further bog rehabilitation, increased afforestation, improved management of grasslands on mineral soils, increasing the use of cover crops in tillage, and the rewetting of organic soils. A new forestry programme will be prepared for launch in 2023. [37-58% reduction in emissions by 2030]*

Section 17.3.1 deals with forestry under the LULUCF Sector heading.

> *Forests and forest products play an important role in mitigating climate change. Sustainably managed forests are a net absorber of carbon. Using wood and wood-based products for construction is a sustainable substitute for conventional carbon-heavy construction products, such as concrete, brick and steel. Afforestation is the single largest land-based climate change mitigation measure available to Ireland. Management of our existing forests also provides opportunities to increase carbon stores:*
> - *Project Woodland will facilitate the preparation of a new forest strategy that recognises the multiple benefits that forests provide.*
> - *We will continue to promote afforestation in order to increase planting to a rate consistent with realising our 2030 ambition and contribute to achieving carbon neutrality no later than 2050.*
> - *A new Forestry Programme will launch in 2023 focussing on the importance of climate smart forestry.*
> - *We will afforest in* pursuit of commercial, climate, water and biodiversity objectives, both through planting and natural regeneration
> - *We will facilitate the creation of small native forests as part of our agri-environment schemes, avoiding poor citing of trees to ensure biodiversity as well as carbon goals are met.*
> - *We will continue to support the mobilisation of round wood, through initiatives such as investing in harvesting infrastructure, and research in timber and processing industries.*
> - *We will increase the monitoring of the forest estate to reduce illegal deforestation.*

- *Support will be provided to encourage the increased use of alternative management systems such as close to nature forestry and agro forestry*
- *We will support the conservation and sustainable use of forest genetic resources, which is essential to protect the genetic diversity of our forests and improve resilience to climate change.*
- We will develop decision support tools to enable forest owners to make decisions on timing of harvesting (such as extended rotations) to optimise carbon storage.

12.10 Climate Action Plan 2019

The Climate Action Plan 2019 set an afforestation target of 8,000 ha per year by 2030. The CCAC are now advising that this would need to be increased to approximately 13,000 to 16,000 ha per year. Proposed measures to meet these targets would include:

- Increase the level of afforestation to meet targets
- Increate output of forestry licences to meet demand
- Promote the role of afforestation as a climate solution
- Encourage the planting of small woodlands as part of DAFM agri-environment and afforestation schemes
- Explore and identify opportunities to increase afforestation.

There are parallel and complementary schemes to be put in place in accordance with the common agricultural fund, the rural development schemes and other mechanisms for incentivising and remunerating landowners for afforestation and small woodland planting, but such financial measures are outside the scope of this regulatory review which is primarily concerned with the licensing regime currently in place.

The CCAC's advice on the level of afforestation required to meet mitigation targets does not appear to engage specifically with the land use change considerations under EU law for example under the SEA Directive, the EIA Directive, the Habitats and Birds Directives, the Water Framework Directive, and the European Landscape Convention. Indeed, a common feature of the EU and national forestry strategies and policies is a lack of direct engagement in the challenge of aligning the policy of afforestation, with other policies for example in relation to food production, biodiversity and habitat protection, protection of water bodies, and proper planning and sustainable development considerations under the Development Plan and Planning legislation.

12.11 Moving towards a Plan-led approach

The EU Forest Strategy 2030 calls for the right tree in the right place and for the right purpose. The Climate Change Advisory Council in its recent climate budget advice to Government has also emphasised the need for a rapid and immediate acceleration in afforestation. To facilitate such growth within a regulatory framework, the ideal is an over-arching plan-led approach which would streamline decision-making on individual applications.

The EU Forestry Strategy 2030 proposes actions, including a proposal to prepare EU legislation providing for each Member State to prepare and submit to the Commission a National Forest Strategy and a National Forest Management Plan (and/or regional and local, if considered appropriate), subject to specified criteria and measures to ensure a consistent approach across the EU. There are already, in many Member States, existing comprehensive national forest programmes and strategies, developed according to internationally agreed commitments, such as the United Nations Strategic Plan for Forests and the FOREST EUROPE Vienna Resolution, and in accordance with each Member State's own competency.

There is currently no express provision within the Forestry Act 2014 for the Minister to prepare a national Forest Plan. A power to that effect could be modelled on the power of local authorities to

prepare a Development Plan under the Planning and Development Act 2000, as amended. A statutory instrument could set out the necessary elements for a Forest Plan.

The Plan could be for a period of ten years, with an obligation to review no less than 3 years before it is due to expire. It could provide for collaboration between *inter alia* the NPWS, DAFM, EPA, and other key departments and agencies to ensure a co-ordinated approach. The public should be consulted early in the plan-making process.

The Plan could set out the overall strategy for the sustainable expansion and management of forestry in accordance with climate and biodiversity action plans, and with EU law. Rather than focus exclusively on targets and policy measures, the Plan could have the objective of identifying "go to" areas for forestry, subject to the necessary AA and SEA requirements[xxiv].

Criteria for classifying lands as suitable or not suitable for all or certain types of forestry have previously been developed by DAFM in the "Indicative Forest Statement" (2008), and further plans and studies have been undertaken by and on behalf of DAFM, for the purposes of identifying *productive* forest lands (for the purposes of targeting payments), and by COFORD in identifying the availability of land for forestry[165].

Spatial zoning at a local level is likely better achieved by each local authority at a Development Plan level, and there is already provision in the Planning Acts and the NPF for forestry objectives to be incorporated into the land use objectives in County Development plans.

Through these means, it may be possible to encourage the management of features of the landscape, such as traditional field boundaries, important for the ecological coherence of the Natura 2000 network and essential for the migration, dispersal, and genetic exchange of wild species.

The plan may outline and promote compliance with environmental standards and objectives established *inter alia* —

- For surface and ground water bodies in accordance with the Water Framework Directive
- For the preservation and conservation of the character of the landscape, in accordance with the European Landscape Convention, the National Landscape Strategy, and the Landscape Character Assessments set out in County Development Plans
- For the protection of national monuments, archaeological or architectural, historical cultural or other features of interest, rights of way,
- For the provision of amenities, recreational areas, and tourism
- For climate action in accordance with the Climate Action and Low Carbon Development Act 2015, as amended, and the Climate Action Plan
- For European sites, and for the protection of species covered by SI 477/2011 and the Wildlife Acts

The Plan should demonstrate its consistency with other relevant plans, including inter alia the National Planning Framework, the regional spatial and economic strategies, the National River Basin Management Plan, and the National Biodiversity Action Plan.

A plan-led approach has significant potential to streamline decision-making on individual applications, which is particularly important where there are such a large volume of relatively small-scale applications. The site selection criteria and evidence base will already be established. It also would make in-combination assessments easier and more robust.

Several County Development Plans incorporate objectives in relation to afforestation in the context of landscape, and many will include a specific Landscape Character Assessment which may set

[xxiv] This is a Recommendation in the Regulatory Review Report.

out specific objectives and requirements in relation to afforestation and felling within the local authority area, notwithstanding that these no longer form part of the planning system.

13 Comparative analysis of regulatory approach in other jurisdictions

13.1 Selection of jurisdictions

Having consulted with the Working Groups and canvassed a broad range of views, the Project Board requested that the comparative jurisdictions should include:

- The Wallonia Region of Belgium
- Denmark
- Scotland

In choosing the comparative jurisdictions, specific qualities were agreed upon to gain as constructive a review as possible. These criteria were as follows,

- The presence of a similar afforestation regime.
- Hydrological connectivity.
- Historical origin of low forest coverage.

13.2 Preparation of Questionnaire

A Glossary of Terms was prepared, to ensure that the responses could be meaningfully compared, despite language barriers and differences in national terminology for EU law concepts.

The Questionnaire reflects the topics and themes and issues raised during early engagements with stakeholders before the Questionnaire was finalised.

The Questionnaire raises legal queries, to try to understand the legislative and policy framework underpinning the approach to the forestry industry in the comparator countries. The questionnaire was completed by specialist lawyers based in each of the comparator jurisdictions. These lawyers do not speak for the regulators or the industry in those countries. There has been no independent verification of the accuracy or completeness of the responses provided, and reliance is placed on the professionalism and expertise of the firms engaged.

13.3 Contributors to the Questionnaire

SHEPHERD+WEDDERBURN

Shepherd and Wedderburn are the largest Scottish-headquartered UK law firm, with offices in Edinburgh, Glasgow, Aberdeen, London, and Dublin. Shepherd and Wedderburn have a reputation for innovation in all the key sectors of the economy, including landmark clean energy projects. Shepherd and Wedderburn have been at the forefront of the energy sector in Scotland, the UK and internationally, for over 30 years. Their work spans the spectrum of energy technologies covering everything from clean energy to oil, facilitating a unique knowledge of the regulatory aspects of the sector.

Stibbe

Stibbe is a specialist law firm, with presence in the Benelux region, together with offices in London and New York. As one of the leading environment and planning firms in Benelux, Stibbe provides tailor-made solutions for some of the largest and most complex projects. Stibbe possesses proven experience advising on environmental law matters, from noise pollution to nature preservation. In addition,

they are also one of the leading firms in nuclear and sustainable energy, such as large-scale wind farms.

Plesner is a leading Danish law firm. They offer solution-oriented advice and assistance in all areas of environmental and planning including land use, development, and operation of business. Plesner has concrete experience in working with public authorities, publicly owned companies, and companies with a wide range of different environmental law issues. In addition, they possess considerable experience in conducting legal and complaints board cases in relation to environmental and planning matters.

13.4 Limitations of the Questionnaire

The Questionnaire raises specific queries with no factual context and therefore the responses should not be construed as legal advice. The fact that a specific regulatory approach is followed in another country does not necessarily mean that that approach is consistent with EU law, or would be upheld by the Courts if adopted in Ireland.

We have noted in our legal research a marked increase in CJEU rulings relating to forestry activities and their impacts on strictly protected species and birds, as well as habitats, and commentary from the CJEU in those rulings which would suggest a concern as to whether the regulatory controls for felling, in particular, are sufficient to protect and conserve biodiversity and water interests.

Accordingly, while regard is had to the responses to the Questionnaire throughout the Regulatory Review Report, the Recommendations are based on EU law as it is applied and interpreted by the Irish Courts and the CJEU, not based on what is being done in other EU Member State jurisdictions.

Glossary

Aarhus Convention: Convention on access to information, public participation in decision-making and access to justice in environmental matters was adopted at Fourth Ministerial Conference "Environment for Europe" in Aarhus, Denmark, on 25 June 1998.
Adaptive Management Approach: A permitting approach which involves an '*authorisation in the face of uncertainty, as part of a rigorously planned and controlled trial, with careful monitoring and periodic review to provide feedback and adaptation of management decisions in light of new information*'- defined by R Cooney & B Dickson

AA Screening: A screening assessment to determine whether a proposed plan or project or activity is likely to have significant effects on a Natura 2000 site, pursuant to Article 6(3) of the Habitats Directive.

Aerial Fertilisation: To apply fertiliser to a forest by use of an aircraft.

Afforestation: The conversion of land to forest, as defined in Forestry Act 2014.

Annex I Projects: Projects listed in Annex I of the EIA Directive in respect of which EIA is mandatory as significant effects on the environment are assumed.

Annex II Projects: Projects listed in Annex II of the EIA Directive. Where a threshold is set, any above-threshold project will require EIA. Below-threshold projects, or projects which are not subject to any threshold, require a case-by-case EIA screening assessment and determination.

Annex III Criteria: Annex III of the EIA Directive lists criteria for the purposes of screening for likely significant effects on the environment to determine whether EIA is required.

Appropriate Assessment ("AA"): An assessment of the implications of a plan or project or activity on a European site, in accordance with Article 6(3) of the Habitats Directive, to ascertain whether the proposed plan or project or activity would have adverse impacts on the integrity of the European site concerned.

Best Available Technology ("BAT"): The most effective technique available to a particular industry sector to achieve a high level of protection of the environment.

Birds Directive: Directive 2009/147/EC on the conservation of wild birds ('Birds Directive')

Catchment (or Catchment Area): The land area from which rainfall will drain overland or (with some exceptions for groundwater flow, which may be inter-catchment) through sub-surface drainage, into a river, lake, reservoir, or sea.

CCAC (Climate Change Advisory Council): The Council provides independent and science-based advice to Government and policy makers on what Ireland needs to do to achieve a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy by 2050.

CJEU: The Court of Justice of the European Union is the judicial branch of the European Union.

Clear-fell (and Clear-felling to be construed accordingly) is the harvesting of all marketable trees at the end of a forest rotation, generally between age 30 and 50 in conifer forests and later for broadleaves.

Climate Action and Low Carbon Development Act (as amended): Climate Action and Low Carbon Development Act 2015, and the Climate Action and Low Carbon Development (Amendment) Act 2021 Acts to provide for the approval of plans by the Government in relation to climate change for the purpose of pursuing the transition to a climate resilient, biodiversity rich and climate neutral economy by no later than the end of the year 2050.

Competent Authority: The decision-making body or person designated as the competent authority under the relevant EU Directive or regulation.

Conifers: A tree that bears cones and needle-like or scale-like leaves that are typically evergreen. Conifers may be native species or non-native species.

Consent : The decision which permits the proposed plan, project, or activity to proceed, and including any licence, permission, authorisation, or permit, but not including any exemption or derogation from an obligation to obtain consent.

Conservation: For the purpose of the Habitat Directive "*Conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status…*".

Cumulative Impact The impacts (positive or negative, direct, and indirect, long-term, and short-term impacts) arising from a range of activities throughout an area or region, where each individual effect may not be significant if taken in isolation.

DECC: Department of the Environment, Climate and Communications

Deciduous: Trees which shed leaves annually.

Deforestation: The conversion of a 'forest' into land that is not a forest, as defined in Forestry Act 2014.

De Minimis: 'De minimis' is a legal principle which allows for matters that are small scale or of insufficient importance to be exempted from a rule or requirement.

Derogation: A derogation is a provision in an EU legislative measure which allows for all or part of the legal measure to be applied differently, or not at all, to individuals, groups, or organisations.

EAFRD: European Agricultural Fund for Rural Development.

Ecological Corridor: A strip of land comprising vegetation or habitat used by wildlife and potentially allowing movement of biotic factors between two areas.

Ecological status of surface water bodies: Ecological status is an assessment of the quality of the structure and functioning of surface water ecosystems. It shows the influence of pressures (e.g., pollution and habitat degradation) on the identified quality elements.

EIA Directive: Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, as revised by Directive 2014/52/EU

EIA Report ("EIAR"): A report prepared by a person seeking consent for a project subject to a requirement for EIA pursuant to the EIA Directive.

EIA Screening: A screening assessment to determine whether a proposed project falling within a class of project to which the EIA Directive applies is likely to have a significant effect on the environment and requires EIA.

Environmental Impact Assessment ("EIA"): A procedure for assessing the environmental impacts of certain classes of project listed in the EIA Directive

EPA: Environmental Protection Agency.

EU Biodiversity Strategy: COM (2020) 380 final, A key pillar of the European Green Deal.

EU Forest Strategy 2030: COM/2021/572 final, New EU Forest Strategy.

EU Green Deal Strategy for 2030: COM/2019/640, commits to tackling climate and environmental challenges with the objective of no net emissions of greenhouse gases by 2050.

European Landscape Convention: The Convention aims to encourage public authorities to adopt policies and measures at local, regional, national, and international level for protecting, managing, and planning landscapes throughout Europe.

Ex situ: Outside of natural habitat/location.

Felling: The cutting through the trunk of trees to such an extent that the tree falls or is rendered liable to fall.

Forest: The UN Food and Agriculture Organisation (FAO) defines a 'forest' as lands of more than 0.5 hectare, with trees higher than 5 metres and a tree canopy cover of more than 10 %, which are not primarily under agricultural or urban land use. The Irish Forestry Act 2014 defines a 'forest' as land under trees (of any species) of more than 0.1 hectare and tree crown cover (or potential cover) of more than 20% of the total area.

Forester: A 'forester' or otherwise known registered forester. A forester possesses specific qualifications and has the required technical ability. Applicants under the various forestry schemes must - unless expressly stated otherwise - use a registered forester to plan, prepare and submit their application for approval or grant aid and in many cases supervise or carry out the work being grant aided.

Forestry Appeals Committee: The Forestry Appeals Committee (FAC) provides an appeals service where, if a person is dissatisfied with a decision of the Minister or an officer of the Minister, they may submit an appeal against a decision on a licence, concerning the following: afforestation, felling, forest road works, aerial fertilisation.

FOREST EUROPE: A pan-European ministerial level voluntary political process/conference for the promotion of sustainable management of European forests.

Forestry Life Cycle: Coillte defines the forestry life cycle as 1. Planting, 2. Growing, 3. Managing, 4. Harvesting.

Forest Management Plan ("FMP"): A plan prepared for all managed public forests and certain private forests, which translates EU, national and regional policy objectives, and strategic priorities into reality on the ground. An FMP should contain forest-related risk assessment and management, and integrate biodiversity-related data, and any other elements which may be

proposed by the EU under the EU Forest Strategy.

Forest Plan A spatial or land use plan identifying constraints and potential for forestry (afforestation), including areas where afforestation is permitted in principle or not permitted. A Forest Plan may be national, regional, or local.

Forest Programme: A programme setting out targets for afforestation, felling, and the conditions for the payment of grants and premia subject to state aid approval for forestry in accordance with the CAP and/or EAFRD. A Forest Programme may be national, regional, or local.

Forestry Programme 2014-2020: Ireland's proposals for 100% State aid funding for a new Forestry Programme for the period 2014 – 2020. The measures proposed were consistent with the recently published "Forests, products and people Ireland's forest policy –a renewed vision."

Forests, Products and People - Ireland's Forest Policy, a Renewed Vision:
This renewed policy sets out an updated national forest policy strategy which is fit for purpose, reflects, and takes account of the substantial changes that have occurred in Irish forestry since the publication of its forerunner Growing for the Future in 1996; and which will steer and guide the expansion of the forest sector out to 2046 in a sustainable and cost-efficient manner.

Forest Road: A road (other than a public road) that serves a forest

Greater Dublin Drainage Strategy: This strategy makes detailed recommendations on surface drainage and wastewater infrastructure requirements, which include the optimisation of the capacity of existing plants and networks for near-term requirements, coupled with the development of new infrastructure to meet growth in the medium and long- term.

Green Bridges: Green bridges and eco-ducts re-connect natural areas that have been artificially divided, by roads or railway lines for example.

Habitats Directive Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended

IFORIS- Integrated Forestry Information System: The system enables an integrated process of digital mapping. IFORIS Internet (INET) is an extension of IFORIS and was designed to provide a range of online services to the Registered Foresters and Forestry Companies.

Land zoning: The control of land use by only allowing land development in fixed areas or zones.

LULUCF Regulation: Land use, land-use change and forestry Regulation: Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU

Medium Combustion Plant Directive: Directive (EU) 2015/2193 on the limitation of emissions of certain pollutants into the air from MCPs.

National Landscape Strategy: The National Landscape Strategy of Ireland aims to implement the European Landscape Convention (ELC) by providing for specific measures and actions to promote the protection, management and planning of the landscape.

Natura 2000 site: A Special Area of Conservation ("SAC") designated under the Habitats Directive or a Special Protection Area ("SPA") under the Birds Directive, forming part of the EU Natura 2000 Network.

Natura Impact Report ("NIR"): A report prepared in accordance with Article 6(3) of the Habitats Directive for the purposes of informing the AA of a plan or programme.

Natura Impact Statement ("NIS"): A document prepared by an applicant for consent, setting out the information required by the competent authority to carry out an AA in accordance with Article 6(3) of the Habitats Directive.

Natural range: The geographical area over which a species has naturally lived in recent times (since about 5000 years before the present), excluding any changes to that range that result from human activities. Also known as ecological range or geographical range. (References in this report both to the 'core' range and 'maximum' range within the natural range of a species)

Natural Regeneration: The generation of trees from natural seed fall.

Precautionary Principle: The precautionary principle is an approach to risk management, where, if it is possible that a given policy or action might cause harm to the public or the environment and if there is still no scientific agreement on the issue, the policy or action in question should not be carried out. This principle is set out in Article 191 of the Treaty on the Functioning of the European Union.

Public Participation: The involvement, as an enfranchised citizen, in public matters, with the purpose of exerting influence. Express public participation rights are found in the Aarhus Convention, the EIA Directive, and the SEA Directive.

Purposive Interpretation: The purposive approach is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment within the context of the law's purpose

Replant (and Replanting to be construed accordingly): To deliberately restock with trees an area from which trees have been felled, removed, or otherwise destroyed, or to deliberately restock other lands, but excluding Natural Regeneration

River Basin District ("RBD"): The area of land and sea, made up of one or more neighbouring river basins together with their associated groundwaters and coastal waters, which is identified under Article 3(1) of the WFD as the main unit for management of river basins.

River Basin Management Plan 2018-2021: The River Basin Management Plan for Ireland 2018-2021. The Plan sets out the actions that Ireland will take to improve water quality and achieve 'good' ecological status in water bodies (rivers, lakes, estuaries, and coastal waters) by 2027. Public consultation is ongoing for Ireland's 2011-2027 Plan.

Riparian: Riparian zones represent transitional areas occurring between land and freshwater ecosystems, characterised by distinctive hydrology, soil and biotic conditions and strongly influenced by the stream water. They provide a wide range of riparian functions (e.g., chemical filtration, flood control, bank stabilization, aquatic life, and riparian wildlife support, etc.) and ecosystem services.

Special Area of Conservation (SAC): A Site designated according to the Habitats Directive. Special area of conservation means a site of Community importance designated by the

Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated.

SEA Directive: Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

SEA Environmental Report: A report prepared in accordance with Article 5 of the SEA Directive for the purposes of informing the SEA of the plan or programme.

SEA Screening: A screening assessment to determine whether a plan or programme is likely to have a significant effect on the environment and requires SEA.

Strategic Environmental Assessment ("SEA"): An assessment of a public plan or programme carried out pursuant to the SEA Directive.

Strategic Forest Plan: A plan prepared by a national or regional authority, as applicable, in a manner consistent with the EU Forest Strategy, which lays out the 10, 30, and 50- year strategic vision for forests and forest-based sectors.

Source- Pathway-Receptor Model: An approach to environmental risk assessment for assessing the potential zone of impact / zone of influence of a proposed plan or project or activity.

- Source: the development, activity, or source of pollutant
- Receptor: the receiving environment.
- Pathway: the connectivity between source and receptor, and everything in between

Special Protection Area (SPA): Sites designated for the protection of birds under the Birds Directive

Thin (and Thinning to be construed accordingly): The removal from a forest of excess or diseased trees, or trees of poor quality to improve the growth, health, and to optimise the economic value of the remaining trees.

Transpose: In European Union law, transposition is a process by which the European Union's member states give force to a directive by passing appropriate implementation measures. Transposition is typically done by either primary legislation or secondary legislation.

Water Framework Directive ("WFD") Directive 2000/60/EC: The Directive established a framework for the Community action in the field of water policy

SCHEDULE 1

List of Project Woodland Engagements / Meetings

Schedule of meetings

Forestry Policy Group Meeting: two, on 6 April and 23 June 2022

Project Woodland Board: 8 meetings between 12 November 2021 – 10 June 2022

Working Groups: 12 meetings between 16 November 2021 – 2 May 2022

DAFM Forestry Division: 21 meetings between 7 October 2021 – 22 June 2022

Stakeholder Bilaterals: AIFC Member; An Taisce; Irish Rural Link; EPA; AA Forum; NPWS; Coillte; FII; Irish Forest Owners; Irish Farmers' Association, between 15 November 2021 – 2 May 2022

SCHEDULE 2

Original Questionnaire and responses received from Region of Wallonia, Belgium, Denmark, and Scotland

SCHEDULE 3

Table of possible legislative amendments

Legislation	Recommended Amendment/Insertion
Forestry Act	**New** *"a person shall not be entitled solely by reason of a licence under this section to carry out any development."*
Forestry Regulations	**Revoke:** Part 8 of Forestry Regulations
Forestry Regulations	**Definition of areas where activities will be precluded** Define "no go zones" where specific activities are precluded.
Forestry Act	**Amend:** To prescribe decision-making periods, applicable also where EIA and AA are required, subject to a right of DAFM to extend giving prior notice and reasons (similar to s.18) and applicable to all licence procedures under the Act, not just felling.
Forestry Regulations	**New:** Prescribe interim time-periods for stages in the application procedures, including further information requests and prescribed bodies responses
Forestry Regulations	**Amend:** Regulation 21 and Schedule 4 to mirror Directive 2011/92/EU as revised by Directive 2014/52/EU.
Forestry Regulations	**New:** Make provision for parallel procedures / co-ordinated decision-making on forest road + afforestation licence / forest road + felling licence
Forestry Act	**Amend**: Section 5 or 6 to provide that the Minister may prepare and adopt a national forestry plan or strategy, and setting out the range of matters to be considered in such plan or strategy.
Forestry Regulations	**New:** Standard conditions which may be attached to a licence, and conditions which shall be attached to a licence.
Forestry Act	**New:** Clarify that national regeneration does not constitute afforestation and therefore does not require an afforestation licence.
Forestry Regulations	**Amend:** Provide that, when making an appeal to the Forestry Appeals Committee, the appellant shall also provide, briefly, the grounds of appeal and any factual/legal matters on which they intend to rely.

[1] Directive 2000/60/EC establishing a framework for Community action in the field of water policy (Water Framework Directive).
[2] Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland ('Weser').* Regulation 20(3)(b)(ii) of the Forestry Regulations 2017, as amended, requires the Minister to refuse to grant a licence where the proposed development is likely to have a "significant adverse impact" on water quality.
[3] Case C-251/21, *Piltenes meži SIA v Lauku atbalsta dienests* Judgment 28 April 2022
[4] *Sweetman v An Bord Pleanála, Ireland and the Attorney General, Bradán Beo Teoranta and Galway Co Council* [2021] IEHC 16, Hyland J, delivered on 15 January 2021
[5] *Sweetman v An Bord Pleanála, Ireland and the Attorney General, Bradán Beo Teoranta and Galway Co Council* [2021] IEHC 777, Hyland J, delivered 6 December 2021
[6] Directive 92 / 43 / EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)
[7] Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* Judgment dated 29 July 2019.
[8] For a discussion on relevant authorities to this effect, see *Monkstown Road Residents' Association v An Bord Pleanála & Others* [2022] IEHC 318, Judgment of Holland J delivered 31 May 2022, paragraph 117
[9] Case C-661/20 *European Commission v Slovak Republic,* Judgment dated 22 June 2022
[10] Joined Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen and Others v Länsstyrelsen i Västra Götalands län and Others*, Opinion of Advocate General Kokott delivered 10 September 2020
[11] *Friends of the Irish Environment CLG v The Government of Ireland, Minister of Housing, Planning and Local Government, Ireland and the Attorney General* Supreme Court Determination [2022] IESCDET 22 dated 21 February 2022
[12] Footnote 1
[13] Case C-461/13 *'Weser'* in relation to surface water bodies, Case C-411/17 *Inter-Environnement Wallonie* in relation to groundwater bodies.
[14] EC Environmental Objectives (Surface Water) Regulations 2009 - SI 272/2009; *Sweetman (Bradán Beo)* Footnote 4
[15] Case C-461/13 *'Weser'.*
[16] Footnote 4
[17] Footnote 5
[18] https://www.eea.europa.eu/data-and-maps/data/wise-wfd-protected-areas-2
[19] Case C-461/13 *'Weser'*
[20] Footnote 19
[21] Case C-411/17 *Inter-Environnement Wallonnie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL* judgment delivered 29 July 2019
[22] Case C-461/13 *'Weser'.* The CJEU reached the same view, in relation to groundwater, in Case C-411/17 *Inter-Environnement Wallonie.*
[23] Footnote 5
[24] *An Taisce v An Bord Pleanála, Ireland and the Attorney General, and Kilkenny Cheese Limited* [2021] IEHC 254, Humphreys J delivered 20 April 2021. Subsequently determined by the Supreme Court on appeal: [2022] IESC 8, Hogan J delivered 16 February 2022
[25] Case C-251/21, *Piltenes meži SIA v Lauku atbalsta dienests* Judgment 28 April 2022
[26] Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias & Others* Judgment 11 September 2012
[27] *Case C- 195/12 Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne,* Judgment 26 September 2013
[28] Footnote 7.
[29] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Birds Directive)
[30] C-6/04 *Commission v United Kingdom* Judgment 20 October 2005, para 34 "*It is clear that, in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate."*
[31] "Dutch Nitrates" Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment and Others*
[32] C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* (*'Waddensee'*)
[33] C-304/05 *Commission v Italy* Judgment 20 September 2007
[34] Case C-226/08 *Stadt Papenburg v Bundesrepublik Deutschland* Judgment 14 January 2010
[35] Case C-399/14 *Grüne Liga Sachsen, Judgment 14 January 2016*

[36] Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* Judgment dated 29 July 2019.
[37] EC (Birds and Natural Habitats) Regulations 2011 (SI 477/2011) as amended (SI 293/2021).
[38] Case C-88/19 *Alianța pentru combaterear abuzurilor v TM, UN, Direcția pentru Monitorizarea şi Protecția Animalelor* Judgment 11 June 2020
[39] Joined Cases C-473/19 and C-474/19 Föreningen Skydda Skogen *and Others v Länsstyrelsen i Västra Götalands län and Others*, Judgment 4 March 2021, Opinion of Advocate General Kokott delivered 10 September 2020 ('Swedish Logging')
[40] Footnote 30
[41] Case C-357/20 *IE v Magistrat der Stadt Wien* Judgment 28 October 2021
[42] Case C-98/03 *Commission v Germany* Judgment 10 January 2006
[43] C-441/17 *Commission v Poland (Białowieża Forest),* paragraph 237
[44] Case C-383/09 *Commission v France* Judgment 9 June 2011
[45] Case C-477/19 *IE v Magistrat der Stadt Wien* Judgment 2 July 2020
[46] Footnote 41
[47] *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, 10th March, 2020) Simons J
[48] See also on the same point, *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622, [2020] 12 JIC 0201 (Unreported, High Court, McDonald J., 2nd December 2020) at para. 108
[49] *Hellfire Massy Residents Association v An Bord Pleanála and Others* [2021] IEHC 424, decision of Humphreys J delivered 2 July 2021
[50] Case C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčin* Judgment 8 November 2016
[51] Case C-463/20 *Namur-Est Environnement ASBL v Région Wallonne,* Judgment 24 February 2022
[52] C-674/17 *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo-Kainuu ry* ('*Finnish Wolves*') Judgment 10 October 2019
[53] Case C-342/05 *Commission v Finland* Judgment 14 June 2007
[54] See also C-141/14 *Commission* v *Bulgaria;* C-461/14 *Commission* v *Spain*
[55] Member States are entitled to adopt more stringent measures than are strictly necessary under EU law (subject to other TFEU principles). Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*
[56] Case C-252/85 *Commission v France* and Case C-44/95 *Royal Society for the Protection of Birds*
[57] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability regarding the prevention and remedying of environmental damage
[58] Case C-258/11 *Sweetman and Others* Judgment 11 April 2013, Opinion of Advocate General Sharpston 22 November 2012
[59] C-387/15 and C-388/15 *Orleans and Others*, paragraph 44
[60] Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging ('Waddensee'), Judgment 7 September 2004
[61] C-387/15 and C-388/15 *Orleans and Others*, paragraph 51; C-142/16 *Commission* v *Germany* (Moorburg), para 57.
[62] *Case C -418/04 Commission V Ireland, Judgment 13 December 2007;* Case C-538/09 *Commission v Belgium*
[63] Case C-98/03 *Commission v Germany,* Judgment 10 January 2006; Opinion of Advocate General Tizzano, delivered 24 November 2005, paragraph 37
[64] *Case C- 241/08 Commission v France, Judgment 4 of March 2010; See also Case C-6/04 Commission v UK, Judgment 20 October 2005.*
[65] *Heather Hill Management Company clg v An Bord Pleanála and Others* [2022] IEHC 146, paragraph 250, judgment delivered 16 March 2022
[66] In Case C-127/02 *'Waddensee'* the CJEU held that an activity or project that comes within the definition of 'project' under the EIA Directive will also be a 'plan or project' for the purposes of the Habitats Directive. In Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, the CJEU held that the term 'project' as defined in Article 1(2)(a) of the EIA Directive, also involves *alterations to the physical aspect of a site*.
[67] *Case C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment, Judgment 7 November 2018, Opinion of Advocat General Kokott delivered on 25 July 2018*
[68] Case C-226/08 *Stadt Papenburg v Bundesrepublik Deutschland* Judgment 14 January 2010
[69] *Friends of the Irish Environment Limited v Minister for Communications, Climate Action and Environment & Others (Peat exemption)* [2019] IEHC 646, paragraph 56, Judgment of Mr. Justice Garrett Simons delivered on 20 September 2019,
[70] DAFM Working Document '*Appropriate Assessment Procedure Guidance Note & iFORIS SOP for DAFM Forestry Inspectors*' (November 2019)

[71] *Natura Impact Statements for Forestry Projects Guidance Note and Template* (August 2020) https://assets.gov.ie/96698/7e8a04b0-82d0-4e43-ac60-ca37652f998a.pdf

[72] Evidence shows that DAFM sought to recruit additional ecologists and consultancy services to meet the increased volume of Appropriate Assessments but there was a time-lag before those services and resources could be effectively deployed https://www.oireachtas.ie/en/debates/question/2021-12-09/360/ ; https://www.teagasc.ie/crops/forestry/advice/general-topics/appropriate-assessment-procedures/ ; https://www.gov.ie/en/press-release/8d5d4f-statement-from-minister-andrew-doyle-on-forestry-licensing-process/ ; see e-tenders invitation for specialist environmental resources https://irl.eu-supply.com/ctm/Supplier/PublicPurchase/162298/0/0?returnUrl=ctm/Supplier/PublicTenders&b=ETENDERS_SIMPLE

[73] https://www.teagasc.ie/media/website/crops/forestry/advice/Standards-for-Felling-and-Reforestation.pdf and https://www.gov.ie/en/publication/regulation-forest-health-and-resources/#trees-and-the-law

[74] Commission notice Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC 2021/C 437/01 (OJ C, C/437, 28.10.2021, p. 1, CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021XC1028(02)) page 20

[75] *Friends of the Irish Environment CLG v the Government of Ireland, Minister of Housing, Planning and Local Government, Ireland and the Attorney General* [2021] IECA 317, Costello J in the Court of Appeal, 26 November 2021, para 146, in relation to the EC Guidance on the Implementation of the SEA Directive. The Court of Appeal held that the High Court should have engaged with the reasoning set out in the EC Guidance and explained why it disagreed with the opinion of the Commission on the interpretation of the requirements of the Directive

[76] *Monkstown Road Residents' Association v An Bord Pleanála & Others* [2022] IEHC 318, Judgment of Holland J delivered 31 May 2022.

[77] In Case C-243/15 *Lesoochranárske zoskupenie VLK*, the CJEU held that a decision involving a plan or project likely to have a significant effect on a European site in respect of which an Article 6(3) Appropriate Assessment is required is subject to the public participation rights conferred by the Aarhus Convention

[78] *Langton v Secretary of State for Environment, Food and Rural Affairs and Natural England* [2019] EWCA Civ 1562, judgment dated 17 September 2019

[79] *Reid v An Bord Pleanála and Intel* [2021] IEHC 362:"*The EIA directive says that the developer's material must be prepared by competent experts (art. 5(3)(a)) and that* "the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report*" (art. 5(3)(b)). As regards whether this requirement for sufficient expertise also applies to appropriate assessment under the habitats directive, logically it must so apply, since effect on habitats is a more particular example of effects generally to which the sufficient expertise obligation does apply. It follows that there is an autonomous obligation on the board to bring the necessary level of expertise to bear on the assessment of the developer's material for the purposes of the habitats directive.* "Paragraph 41

[80] Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* Judgment dated 29 July 2019. Also C-258/11 *Sweetman and Others*, paragraph 31; C-387/15 and C-388/15 *Orleans and Others*, paragraph 46

[81] C-258/11 *Sweetman and Others*, paragraph 39; C-387/15 and C-388/15 *Orleans and Others*, paragraph 47; *Case C- 164/17 Grace and Sweetman, Judgment 25 July*

[82] C-239/04 *Commission* v *Portugal*, paragraph 24, C-142/16 *Commission* v *Germany*, , paragraph 42.

[83] C-254/19 *Friends of the Irish Environment,* Advocate General Kokott's Opinion, citing Case C-348/15 *Stadt Wiener Neustadt* para 44

[84] *Case C-521/12 Briels and Others v Minister van Infrastructuur en Milieu, Judgment 15 May 2014*

[85] *Case C-387/15 and C-388/15 Hilde Orleans and Others v Vlaams Gewest, Judgment 21 July 2016*

[86] C-399/14 *Grüne Liga Sachsen and Others;* C-404/09 *Commission* v *Spain*

[87] For a discussion on relevant authorities to this effect, see *Monkstown Road Residents' Association v An Bord Pleanála & Others* [2022] IEHC 318, Judgment of Holland J delivered 31 May 2022, paragraph 117

[88] Case C-661/20 *European Commission v Slovak Republic,* Judgment dated 22 June 2022

[89] Joined Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen and Others v Länsstyrelsen i Västra Götalands län and Others*, Opinion of Advocate General Kokott delivered 10 September 2020

[90] *An Taisce v An Bord Pleanála, the Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General, and Kilkenny Cheese Limited* [2022] IESC 8, judgment of the Court delivered by Mr Justice Hogan on 16 February 2022

[91] *Fitzpatrick & Daly v An Bord Pleanála, Ireland and the Attorney General, and Apple Distribution International* [2019] IESC 23, per Finlay Geoghegan J, paragraph 60

[92] *Friends of the Irish Environment Limited v Minister for Communications, Climate Action and Environment & Others (Peat exemption)* [2019] IEHC 646, paragraph 56, Judgment of Mr. Justice Garrett Simons delivered on 20 September 2019,
[93] Case C-215/06 *Commission v Ireland (Derrybrien), judgment 3 July 2008*
[94] Article 2(1) '*Those projects are defined in Article 4*.' Article 4 refers to project types listed in Annexes I and II of the Directive. See also Case C 156/07 *Aiello and Others*, paragraph 34
[95] Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, 'project' includes alterations to the physical aspect of a site.
[96] Footnote 93
[97] Case C-392/96 *Commission of the European Communities v Ireland* Judgment dated 21 September 1999
[98] Planning and Development Regulations 2001, as amended, provides in Regulation 8A that "*Initial afforestation shall be exempted development*."
[99] Case C-329/17 *Gerhard Prenninger and Others v Oberösterreichische Landesregierung and Netz Oberösterreich GmbH* dated 7 August 2018
[100] http://www.coford.ie/media/coford/content/publications/projectreports/ForestRoadManual.pdf
[101] Case C-463/20 *Namur-Est Environnement ASBL v Région Wallonne,* Judgment 24 February 2022
[102] For a discussion on relevant authorities to this effect, see *Monkstown Road Residents' Association v An Bord Pleanála & Others* [2022] IEHC 318, Judgment of Holland J delivered 31 May 2022, paragraph 117
[103] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on nature restoration, COM(2022) 304 final, dated 22 June 2022
[104] https://www.gov.ie/en/publication/9f9e7-eia-portal/
[105] Case C-463/20 *Namur-Est Environnement ASBL v Région Wallonne,* Judgment 24 February 2022
[106] Section 14A(2F) of the Agricultural Appeals Act 2001, as amended"
[107] **Case C-664/15** *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation* judgment of the CJEU delivered 20 December 2017, paragraphs 88 - 92
[108] *Fitzpatrick v an Bord Pleanála, Ireland and the Attorney General, and Apple Distribution International [*2019] IESC 23.
[109] *An Taisce v An Bord Pleanála, The Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General, and Kilkenny Cheese Limited* [2022] IESC 8, delivered 16 February 2022, applying this interpretation both to the EIA Directive and to Article 6(3) of the Habitats Directive.
[110] *An Taisce v. An Bord Pleanála* [2015] IEHC 633
[111] Ó Grianna v. An Bord Pleanála [2014] IEHC 632
[112] *Kemper v. An Bord Pleanála* [2020] IEHC 601.
[113] Case C-441/17 *Commission v Poland (Białowieża Forest)*
[114] C-461/17 *Holohan and Others*, 7 November 2018
[115] Case C-142/07 *Ecologistas en Acción-CODA*
[116] Case C-661/20 *European Commission v Slovak Republic,* Judgment dated 22 June 2022
[117] Joined Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen and Others v Länsstyrelsen i Västra Götalands län and Others*, Opinion of Advocate General Kokott delivered 10 September 2020
[118] *Friends of the Irish Environment CLG v The Government of Ireland, Minister of Housing, Planning and Local Government, Ireland and the Attorney General* Supreme Court Determination [2022] IESCDET 22 dated 21 February 2022
[119] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)
[120] Case C-290/15 *D'Oultremont and Others*, judgment 27 October 2016
[121] https://www.opr.ie/wp-content/uploads/2019/11/Good-Practice-Note_SEA_Forestry-Sector.pdf
[122] Case C-444/15 *Associatzione Italia Nostra Onlus v Comune di Venezia* Judgment 21 December 2016
[123] Case C-295/10 *Valčiukienė & Others*
[124] Case C-160/17 *Thybaut and Others* Judgment 7 June 2018
[125] Case C-305/18 *Verdi Ambiente e Societa (VAS)* Judgment 8 May 2019
[126] *Sinead Kerins and Mark Stedman v An Bord Pleanála, Ireland and the AG, and DBTR-SCRI Fund, a Sub-Fund of CWC Multi-family ICAV*, [2021] IEHC 733, judgment of Humphreys J delivered 30 November 2021
[127] Case C-24/19 *A and Others (Wind turbines at Aalter and Nevele)*
[128] Case C-671/16 *Inter-Environnement Bruxelles and Others,* Judgment 7 June 2018
[129] Case C-300/20 *Bund Naturschutz in Bayern eV,* Judgment delivered 22 February 2022
[130] See paragraph 37, in which the CJEU cites Case C-671/16 *Inter-Environnement Bruxelles and Others,* paragraphs 38-40; noting however that previous decisions of the CJEU had emphasised the *required* nature of the plan or programme in C-567/10 *Inter-Environnement Bruxelles and Others*, paragraph 31; C-160/17 *Thybaut and Others*, para 43; and C-321/18 Terre wallonne, paragraph 34).
[131] Case C-43/18 *Compagnie d'entreprises CFE SA* Judgment 12 June 2019

[132] *Friends of the Irish Environment CLG v The Government of Ireland, Minister of Housing, Planning and Local Government, Ireland and the Attorney General*, [2021] IECA 317, judgment of the Court of Appeal delivered by Costello J, on 26 November 2021
[133] *Friends of the Irish Environment CLG v The Government of Ireland, Minister of Housing, Planning and Local Government, Ireland and the Attorney General* Supreme Court Determination [2022] IESCDET 22 dated 21 February 2022
[134] European Landscape Convention - European Treaty Series No 176. https://rm.coe.int/16807b6bc7
[135] European Landscape Convention Guidelines https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802f80c9
[136] Section 2 of the Planning and Development Act 2000, as amended, provides: *"landscape" has the same meaning as it has in Article 1 of the European Landscape Convention done at Florence on 20 October 2000.*
[137] In Case C-300/20 *Bund Naturschutz in Bayern eV* the CJEU held that a similar statutory provision did not require SEA
[138] Convention on Access to Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998 https://unece.org/DAM/env/pp/documents/cep43e.pdf
[139] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC
[140] Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC
[141] Directive 2010/75/EU on industrial emissions.
[142] *McCaffrey v Minister for Agriculture Food and Marine* [2017] IECA 247 (Hogan J delivered the judgment of the Court of Appeal) see para 36
[143] *An Taisce v An Bord Pleanála, Ireland and the Attorney General, and Sharon Browne* [2020] IESC 39, paragraph 134
[144] *Evans v An Bord Pleanála*, High Court unreported 7 November 2003, cited in *Wexele* [2010] IEHC 21, paragraph 20,
[145] Eco Advocacy [2021] IEHC 265, paragraph 20
[146] *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453, paragraphs 6.15 onwards
[147] *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 637, para. 57
[148] *Balscadden v An Bord Pleanála* [2020] IEHC 586, paras 37-39
[149] *Ballyboden Tidy Towns v. An Bord Pleanála* [2022] IEHC 7, Holland J., 10 January, 2022, at para. 236,
[150] *Atlantic Diamond Ltd. v. An Bord Pleanála* [2021] IEHC 322, Humphreys J, 14 May, 2021); and *Flannery & Ors v An Bord Pleanála* [2022] IEHC 83 Humphreys J. 25 February, 2022
[151] The European Green Deal COM/2019/640 final https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576150542719&uri=COM%3A2019%3A640%3AFIN
[152] EU Biodiversity Strategy for 2030 Bringing nature back into our lives COM/2020/380 final -https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0380
[153] EU Forest Strategy for 2030 COM/2021/572 final https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0572
[154] https://data.consilium.europa.eu/doc/document/ST-13537-2021-INIT/en/pdf
[155] https://www.gov.ie/en/publication/01381-forestry-programme-2014-2020-ireland/
[156] https://npf.ie/wp-content/uploads/Project-Ireland-2040-NPF.pdf
[157] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')
[158] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on nature restoration, COM(2022) 304 final, dated 22 June 2022
[159] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU ('LULUCF Regulation')
[160] Climate Action and Low Carbon Development (Amendment) Act 2015-2021, as commenced by S.I. 468/2021
[161] Letter to the Minister, 25 October 2021 https://www.climatecouncil.ie/media/climatechangeadvisorycouncil/Final%20Letter%20to%20Minister%2025.10.21.pdf

[162] The risk of unintended consequences has been highlighted by, among others, the Environmental Pillar in submissions on the draft Animal Health and Welfare and Forestry (Miscellaneous Provisions) Bill. https://www.kildarestreet.com/sendebates/?id=2022-03-22a.155

[163] 11% figure is based on National Forest Inventory (2017) as reported in Forest Statistics Ireland 2020 published by DAFM https://www.teagasc.ie/media/website/crops/forestry/advice/Forest-Statistics-Ireland-2020.pdf pg.4.

[164] https://www.catchments.ie/call-for-expert-evidence-land-use-evidence-review/

[165] http://www.coford.ie/media/coford/content/publications/cofordarticles/LandAvailabAfforestation130116.pdf

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