Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 11 September 2025 [1]

Case C-58/24

NE,
MY,
HJ,
XF,
WB,
UV,
VK,
JU,
RJ,
DZ
v
An Bord Pleanála,
Minister for Housing, Local Government and Heritage (Ireland),
The Attorney General,
Notice party:
Drumakilla Limited

(Request for a preliminary ruling from the High Court (Ireland))

(Reference for a preliminary ruling – Environment – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Article 12 – System of strict protection for certain animal species – Article 16 – Derogation granted in anticipation of an application for planning permission for a project covered by Directive 2011/92/EU – Article 11 – Aarhus Convention – Article 9(2) – Procedural autonomy – Principle of effectiveness – Procedural rules for challenging the validity of a derogation decision and a development consent decision)

[1] Original language: English.

I. Introduction

1. The present Opinion concerns a request for a preliminary ruling on the interpretation of the Habitats Directive [2] and the EIA Directive. [3] The reference has been made by the High Court (Ireland), in the context of the proceedings brought by a group of natural persons [4] against the derogation decision granted by the Irish authorities, under Article 16(1) of the Habitats Directive, to facilitate the construction of residential units at the former Carmelite monastery at Delgany (County Wicklow, Ireland). [5] That monastery is currently the location of a large colony of microbats, which are strictly protected species listed in Annex IV to the Habitats Directive. [6]

2. The request arises from the fact that the applicants in the main proceedings did not challenge the validity of the derogation decision at issue within the period which, according to the referring court, is prescribed under Irish law. That derogation – which, in that court's eyes, is 'absurdly reasoned' – was challenged at the same time as the decision granting development consent for the project, after that period had expired. According to the referring court, this means that the application for annulment of the derogation decision should be found to be out of time and dismissed, subject to any rule of EU law that might require an outcome to the contrary.

3. This case raises, in the first place, questions of a procedural nature. In particular, it requires that the Court determine whether a procedural rule of national law which lays down a different time period in which to challenge the validity of, on the one hand, a derogation decision granted under Article 16(1) of the Habitats Directive and, on the other hand, a development consent decision falling within the scope of the EIA Directive, is compatible with EU law, specifically in the light of the principle of wide access to justice enshrined in the Aarhus Convention. [7] To that end, the Court will have to reflect on the procedural consequences stemming from its judgment of 24 February 2022, *Namur-Est Environnement* (C-463/20, EU:C:2022:121), [8] in which it declared, in essence, that a derogation decision adopted under the Habitats Directive forms part, under certain conditions, of the development consent procedure established by the EIA Directive. In the second place, this case affords the Court the opportunity to provide further guidance on the substantive conditions with which a competent authority of a Member State must comply when it allows a developer for a project covered by the EIA Directive to derogate from the prohibitions laid down in the Habitats Directive.

2 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive').

3 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 (OJ 2012 L 26, p. 1; 'the EIA Directive').

4 'The applicants in the main proceedings'.

5 'The development project'.

6 See also European Commission, 'EU action plan for the conservation of all bat species in the European Union (2018-2024)' and 'Complementary document', 13 January 2023, available at https://circabc.europa.eu/ui/group/3f466d71-92a7-49eb-9c63-6cb0fadf29dc/library/2b8bfe05-4fa6-43d5-b82a-c6d484cb82e4/details.

7 Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed at Aarhus (Denmark) on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1; 'the Aarhus Convention').

8 'The judgment in *Namur-Est Environnement*'.

II. Legal framework

A. International law

4. Article 9 of the Aarhus Convention, entitled 'Access to justice', provides:

'…

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

…

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.'

B. European Union law

1. The Habitats Directive

5. Article 12(1) of the Habitats Directive is worded as follows:

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

…

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

…

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

6. Article 16(1) of the Habitats Directive provides:

'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;

…

(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;

…'

7. Annex IV to the Habitats Directive, under the title 'Animal and plant species of community interest in need of strict protection', establishes:

'…

(a) ANIMALS

VERTEBRATES

…

MICROCHIROPTERA

…'

2. The EIA Directive

8. Article 1 of the EIA Directive provides:

'1. This Directive shall apply to the assessment of environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive, the following definitions shall apply:

(a) "project" means:

– the execution of construction works or of other installations or schemes,

…

(c) "development consent" means the decision of the competent authority or authorities which entitles the developer to proceed with the project;

…

(g) "environmental impact assessment" means a process consisting of:

(i) the preparation of an environmental impact assessment report by the developer, …

…

(iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and

(v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.

…'

9. Article 2 of the EIA Directive stipulates:

'1. Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4.

…'

10. Article 4 of the EIA Directive states:

'…

2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).

…

4. Where Member States decide to require a determination for projects listed in Annex II, the developer shall provide information on the characteristics of the project and its likely significant effects on the environment. The detailed list of information to be provided is specified in Annex IIA. …

…'

11. Article 6 of the EIA Directive provides:

'…

2. In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

…'

12. Article 11 of the EIA Directive lays down rules on actions brought against decisions which are subject to public participation under the EIA Directive:

'1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

…

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

C. Irish law

13. Order 84, rule 21, of the Rules of the Superior Courts [9] provides:

'(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.

…

[9] 'The RSC'.

(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by

the applicant for such extension.

…'

III. Facts, procedure and the questions referred

14. On 17 January 2020, in anticipation of planning permission for a development project, Drumakilla Limited [10] submitted to the National Parks and Wildlife Service (Ireland) an application for a derogation decision pursuant to Article 16(1) of the Habitats Directive. The application concerned microbats, which are strictly protected species according to Annex IV to that directive, in particular under the animal group *Microchiroptera*. The derogation decision was issued on 4 March 2020 and was subsequently amended on 21 July 2020 to include the brown long-eared bat (*Plecotus auritus*).

15. On 21 October 2020, Drumakilla applied for planning permission for the development project. The application was accompanied inter alia by an environmental impact assessment screening report and the amended derogation decision.

16. On 15 February 2021, An Bord Pleanála (the Irish Planning Board) granted planning permission for the project. [11] In its decision, it considered that the screening report submitted by Drumakilla identified and described adequately the likely effects of the development project on the environment. Moreover, in An Bord Pleanála's view, the proposed development was not likely to have significant effects on the environment on account of the nature and location of the site. It therefore concluded that an environmental impact assessment was not necessary.

17. On 25 March 2021, the applicants in the main proceedings challenged the planning permission decision and the derogation decision.

18. The High Court (Ireland), which is the referring court in the present case, has dismissed the application for annulment of the planning permission decision. By contrast, it adjourned for further submissions in the challenge brought against the derogation decision.

[10] 'Drumakilla' or 'the developer'.

[11] The granting of planning permission must be understood as referring to the concept of 'development consent', as defined in Article 1(2)(c) of the EIA Directive.

19. In that regard, the referring court states, first, that, while the derogation decision indicates that there are no satisfactory alternatives to the grant of that derogation, the materials disclose no consideration of alternatives with less impact on strictly protected species, or of the alternative option of not granting the licence. It can be inferred from this that it is likely that there was no such consideration of alternatives. Moreover, the referring court indicates that the derogation decision states that it is issued in the interests of the protection of the species concerned, a conclusion which, in that court's view, is 'manifestly unreasonable and indeed absurd'.

20. Second, the referring court points out that, under Irish law, there is no specific statute specifying the time limit for challenging the validity of a derogation decision, which means that the general rules on judicial review apply to that challenge. In that respect, the referring court explains that, pursuant to Order 84, rule 21 of the RSC, an application for leave to apply for judicial review must be made within three months from the date when grounds for the application first arose or, on additional request from the applicants, from the date on which an applicant is or ought to have been aware of the contested decision.

21. Third, the referring court further notes that in so far as, under Irish law, a derogation decision under Article 16(1) of the Habitats Directive constitutes a separate substantive decision, and is not part of a series of interim decisions leading to definitive consent for a project, it must be challenged individually within the statutory limitation period laid down by Order 84, rule 21 of the RSC, and not after the adoption of a final decision concerning an application for planning permission. Those time limits are, in the view of the referring court, reasonably foreseeable.

22. Fourth, the referring court specifies that, in the case in the main proceedings, the applicants did not contest the planning permission decision on the basis of the defects in the derogation decision. That is why, according to that court, the challenge to the planning permission decision has been dismissed even though the challenge to the derogation decision remains outstanding.

23. Fifth, the referring court points out that the applicants in the main proceedings did not challenge the validity of the derogation decision within three months of the time when they became or ought to have become aware of it, namely the date on which Drumakilla applied for planning permission. Accordingly, that court considers that that challenge is out of time and must be dismissed. The referring court is inclined to take the view that there is no rule of EU law which would require a contrary outcome. However, since that position is not completely beyond doubt, the referring court considered it appropriate to refer the issue to the Court of Justice.

24. It is in those circumstances that the High Court (Ireland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 11 of [the EIA Directive] read in the light of the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that, in a case where a project within the meaning of Article 1(2)(a) of [the EIA Directive] the subject of an application for development consent (the "primary consent") cannot be carried out without the developer having first obtained another permission (the "secondary consent"), and where the authority competent for granting the primary consent for such a project retains the ability to assess the project's environmental impact more strictly than was done in the secondary consent, such a secondary consent (if granted prior to the primary consent) is to be treated as forming part of the development consent procedure for purposes other than in relation to the scope of matters to be considered or assessed under [the EIA Directive], either generally or where the

secondary consent is a decision adopted under Article 16(1) of [the Habitats Directive] and which authorises a developer to derogate from the applicable species protection measures in order to carry out the project?

(2) If the answer to the first question is Yes, does Article 11 of [the EIA Directive] read in the light of the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that national domestic rules as to the date on which time commences to run to challenge the validity of a decision adopted under Article 16(1) of [the Habitats Directive] (the "secondary consent") must be interpreted so as to preclude that time from commencing to run prior to the date of adoption of the development consent concerned (the "primary consent"), either generally or in a case where: (i) the project was subject to the case-by-case examination envisaged by Article 4(2)(a) of Directive 2011/92, and/or (ii) the determination under Article 4(5) for the purposes of the primary consent was made after the secondary consent had been granted and simultaneously with the decision on the primary consent, and/or (iii) the proceedings challenging the validity of the secondary consent do not contain any ground challenging the relevant primary consent by reference to the asserted invalidity of the secondary consent, and/or (iv) the applicant fails to apply for an extension of time to bring the challenge to the secondary consent, which application is required by domestic law for a late challenge in the absence of any EU law rule to the contrary?

(3) If the answer to the first question is Yes and if the answer to the second question in general is No, does [the EIA Directive] read in the light of Article 47 of the Charter of Fundamental Rights and/or the principle of wide access to justice under Article 9(2) of the Aarhus Convention have the effect that a time limit provided by the domestic law of a [M]ember [S]tate for the bringing of proceedings to assert a right under that Directive, must be reasonably foreseeable, but does not have to be expressly specified in legislation in accordance with Article 11(2) of [the EIA Directive] and/or in practical information made available to the public on access to administrative and judicial review procedures pursuant to Article 11(5) of [the EIA Directive] and/or definitively determined with certainty by domestic [case-law], so that the answer to the second question is unaffected by provision being made in the domestic law of a [M]ember [S]tate for a foreseeable time limit of a general nature which applies to public law actions generally including for the bringing of proceedings challenging a decision adopted under Article 16(1) of [the Habitats Directive] and which authorises a developer to derogate from the applicable species protection measures in order to carry out the project, albeit that this is implicit rather than explicit in the domestic law concerned?

(4) If the answer to the first question is Yes and either the answer to the second question is Yes or the answer to the third question is No, does Article 16(1) of [the Habitats Directive] have the effect that a competent authority cannot conclude that there is "no satisfactory alternative" to a decision which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of [the EIA Directive] unless the competent authority actually considers alternatives such as alternative location or design, or refusal of the derogation?

(5) If the answer to the first question is Yes and either the answer to the second question is Yes or the answer to the third question is No, does Article 16(1) of [the Habitats Directive] have the effect that a competent authority cannot conclude that it is "in the interest of protecting wild fauna and flora and conserving natural habitats" to grant a decision which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of [the EIA Directive] unless some identified

protection is created by the derogation itself rather than by mitigation measures adopted to reduce or compensate for the detriment created by the steps authorised by the derogation decision?'

25. The request for a preliminary ruling was lodged at the Registry of the Court of Justice on 26 January 2024. The applicants in the main proceedings, the Minister for Housing, Local Government and Heritage (Ireland), Ireland and the European Commission submitted written observations. No hearing has been held in the present case. However, the parties replied in writing to the questions put by the Court on 3 March 2025.

IV. Analysis

26. By its questions, the referring court seeks clarification as to the interpretation of Article 11 of the EIA Directive and Article 16(1) of the Habitats Directive, in particular in the light of the principle of wide access to justice laid down in Article 9(2) of the Aarhus Convention.

27. More specifically, by its first three questions, the referring court asks whether the EIA Directive, namely Article 11(2) thereof, must be interpreted as meaning that, where a development project cannot be authorised without the developer having first obtained a derogation decision under Article 16(1) of the Habitats Directive, that decision must be regarded as part of the development consent procedure, in particular for purposes other than those relating to the scope of matters to be assessed under the EIA Directive (*first question*). The referring court puts that question in order further to elucidate whether the period to challenge the lawfulness of a derogation decision can terminate before the date of a decision on development consent, specifically where the applicant does not challenge the validity of the development consent decision on the grounds of defects in the derogation decision (*second question*). By contrast, assuming that the period in which to challenge the lawfulness of a derogation decision can terminate before the date of the decision on development consent, the referring court asks whether that period must be specified in the legislation adopted or in the practical information referred to in Article 11(5) of the EIA Directive, or whether it can simply be reasonably foreseeable (*third question*).

28. In turn, by the two last questions, the referring court seeks to clarify, in essence, (i) whether Article 16(1) of the Habitats Directive requires an effective examination of alternative solutions before the adoption of a derogation decision (*fourth question*), and (ii) whether that provision precludes a competent authority from concluding that it is in the interest of the protection of wild fauna and flora and the conservation of natural habitats to adopt a decision authorising a developer to derogate from the provisions of Article 12 of that directive in order to carry out a development project (*fifth question*).

29. In so far as the first, second and third questions are related to the same procedural issue, concerning the conditions for time limits that apply under national law for challenging the validity of a derogation decision granted under Article 16(1) of the Habitats Directive in order to carry out a project falling under the EIA Directive, I will examine them together. I will subsequently examine the fourth and fifth questions, which relate to the substantive conditions that must be satisfied by a competent authority when deciding whether to grant a derogation from the species protection measures for the purposes of facilitating a development project.

A. The first, second and third questions

30. By the first two questions, the referring court seeks to ascertain, in essence, whether Article 11(2) of the EIA Directive must be interpreted as meaning that the limitation period in which to challenge the validity of a derogation decision adopted under Article 16(1) of the Habitats Directive, for the purposes of a development project falling under the EIA Directive, can terminate before the date on which the development consent is granted. If that is the case, the referring court further asks, by its third question, whether Article 11(5) of the EIA Directive must be interpreted as meaning that limitation periods applicable to derogation decisions must be expressly laid down in national legislation or in the practical information referred to in that provision of the directive.

31. As a preliminary remark, I would recall that, according to Articles 2 and 6 of the EIA Directive, certain projects consisting in the execution of construction works [12] require, before development consent is granted by the competent authorities, (i) an environmental impact assessment and (ii) public participation.

32. As regards the environmental impact assessment, this essentially consists of a report covering all significant effects that the project may have on the environment. [13] That assessment is systematic [14] for the types of projects listed in Annex I to the EIA Directive, [15] whereas, for those listed in Annex II thereto, including urban development projects, as in the case in the main proceedings, that directive leaves it to the Member States to determine whether a project must be subject to it. [16] For that type of project, the developer must provide, nonetheless, information describing the characteristics of the project and its likely significant effects on the environment. [17] Moreover, where the project is likely to have an impact on strictly protected species under the Habitats Directive, the case-law of the Court has established that that impact must be addressed during the environmental assessment of the project. [18]

33. In turn, as regards public participation, that participation refers to the process by which the public concerned, as defined in Article 1(2)(e) of the EIA Directive, has the opportunity to express its views, so that they can be taken into account in the final decision (development consent). The main aim of public participation is to ensure that the public concerned is effectively engaged at an early stage in the decision-making procedures affecting the environment, contributing to public awareness of environmental issues and strengthening public support for the decisions to be taken. [19] That aim is further enhanced by the assurance that the public concerned must have access to review procedures to challenge the legality of decisions,

12 See Article 1(2)(a) of the EIA Directive.

13 See Article 1(2)(g) and Article 3(1) of the EIA Directive.

14 See recital 8 of the EIA Directive.

15 See Article 4(1) of the EIA Directive. A systematic environmental impact assessment is required for projects such as nuclear power stations, long-distance railways, motorways, express roads, waste disposal installations for hazardous waste and dams of a certain capacity. For instance, that provision was applicable to the project concerned by the judgment in *Namur-Est Environnement*.

16 See Article 4(2) of the EIA Directive, which provides that such determination can be made through a case-by-case analysis or through thresholds or criteria.

17 See Article 4(3) of the EIA Directive and Annexes II and II.A thereto.

18 The judgment in *Namur-Est Environnement*, paragraph 52.

19 See recitals 16 and 17 and Article 9(1)(b) of the EIA Directive.

acts or omissions subject to the public participation provisions of the EIA Directive.[20] It is important to note that derogations from the rules of EU law on the protection of species must be made available to the public concerned.[21]

34. Moreover, the Court has already had the opportunity to address the relationship that exists between, on the one hand, a derogation decision adopted under Article 16(1) of the Habitats Directive and, on the other hand, the development consent procedure laid down by the EIA Directive. That was the central question answered by the judgment in *Namur-Est Environnement*, in which the Court examined, first, whether a derogation decision must be considered part of the development consent procedure when that decision is adopted in order to carry out a project falling under Article 1(2)(a) of the EIA Directive. In relation to that question, the Court further examined, second, whether the public participation required for projects falling within the scope of the EIA Directive must have already been ensured before the adoption of a derogation decision.

35. It is important to note that, in the judgment in *Namur-Est Environnement*, the Court took the view that a derogation granted under Article 16(1) of the Habitats Directive constitutes a preliminary decision[22] that contains only a partial assessment of the effects that a project may have on strictly protected species.[23] For that reason, the Court considered that a derogation decision must be necessarily adopted before development consent is given.[24] Moreover, the Court held that, where a Member State confers the power to assess the effects of a project under the Habitats Directive on an authority other than the one issuing development consent, that partial assessment must not prejudge the overall assessment that the latter authority must in any event carry out.[25] On that basis, the Court concluded that a derogation decision forms part of the development consent procedure, where, first, the project cannot be carried out without the developer having first obtained the derogation decision and, second, the authority competent for granting development consent retains the ability to assess the project's environmental impact more strictly than was done in that decision.[26]

36. Although the judgment in *Namur-Est Environnement* concerned a project subject to the requirement of a full environmental impact assessment pursuant to Article 4(1) of the EIA Directive,[27] the Court's findings in that judgment must apply where it is for the Member State to determine, pursuant to Article 4(2), whether a project must undergo that assessment (screening), as is the case in the main proceedings.

[20] See Article 11(1) and (3) of the EIA Directive.

[21] See Article 6(3)(a) of the EIA Directive read in conjunction with Article 5(1)(b) thereof. See also, in that regard, Opinion of Advocate General Kokott in *Namur-Est Environnement* (C-463/20, EU:C:2021:868, points 48 and 49).

[22] The judgment in *Namur-Est Environnement*, paragraphs 62 and 65.

[23] Ibid., paragraph 59.

[24] Ibid., paragraph 59.

[25] Ibid., paragraph 62.

[26] Ibid., point 1 of the operative part.

[27] See the judgment in *Namur-Est Environnement*, paragraph 48.

37. In that regard, I would point out, first of all, that both the full impact assessment and the screening assessment aim to ensure that environmental considerations are integrated into the decision-making process established by the EIA Directive for development projects,[28] including those made on the basis of the information that the public likely to be concerned by the project in question is entitled to provide pursuant to that directive.[29]

38. Moreover, similarly to what the Court declared in the judgment in *Namur-Est Environnement*, the derogation decision constitutes a preliminary decision for the purposes of the determination to be made in accordance with Article 4(2) of the EIA Directive. Article 4(5) of the EIA Directive leaves no doubt in that regard, since it expressly declares that, in those cases, the determination by the competent authority must be made on the basis of the results of the *preliminary* verifications or assessments of the effects on the environment carried out pursuant to EU legislation other than the EIA Directive including, therefore, the Habitats Directive.

39. Lastly, for the purpose of determining, under Article 4(2) of the EIA Directive, whether a project must undergo a full environmental impact assessment, Article 4(3) of that directive requires the relevant selection criteria set out in Annex III to be taken into account.[30] That means that, where the assessment conducted in the context of the derogation procedure under Article 16 of the Habitats Directive is not aligned with those criteria, the competent authority retains the power to evaluate the impact of the project more strictly as regards the effects on protected species, in a similar way to that referred to by the Court in the judgment in *Namur-Est Environnement*.

40. It follows that, in a situation such as that described in the order for reference, the derogation decision at issue must be regarded as forming part of the development consent procedure in the terms set out in the judgment in *Namur-Est Environnement*.[31]

41. The question remains whether, where a derogation decision must be regarded as part of the development consent procedure, pursuant to the conditions laid down by the Court in the judgment in *Namur-Est Environnement*, national law can require that that decision be challenged before the termination of the limitation period laid down in respect of the challenge of the development consent decision.

42. In that regard, it follows from the settled case-law of the Court that, according to the EIA Directive, the Member States have discretion as to the determination of the procedural rules under which a final decision on development consent can be granted.[32] That means that they do not have to provide for a single procedure in which all the environmental effects of a project are decided upon by means of a single authorisation. On the contrary, the Court has stated that the Member States are entitled to apportion the various competences relating to the environmental assessment of a project among several different authorities by conferring on each of them decision-making powers in the matter.[33] It follows that, in the context of assessing the environmental impact of a project falling under the EIA Directive, including within the screening

[28] See Article 8a(1)(b) of the EIA Directive. See also, as an interpretative element in that regard, Article 11 TFEU, which provides that environmental protection requirements must be integrated inter alia into the implementation of the Union's activities.

[29] See, in that regard, recital 7 of the EIA Directive.

[30] See, in particular, point 3 of that annex, under the heading 'Type and characteristics of the potential impact'.

[31] See point 35 of the present Opinion.

[32] See judgment of 3 March 2011, *Commission* v *Ireland* (C-50/09, EU:C:2011:109, paragraphs 72 to 74).

[33] The judgment in *Namur-Est Environnement*, paragraph 56.

procedure, separate decisions can be adopted, which necessarily means that they can be subject to challenge at different stages under national law in conformity with the procedural rules laid down with regard to each of those challenges.

43. However, the Court has also stated that the Member States must exercise their discretion in accordance with the requirements laid down by the EIA Directive and in full compliance with the directive's aims. [34] In particular, since the Court has expressly interpreted Article 16 of the Habitats Directive as meaning that a derogation granted under that provision constitutes a preliminary decision for the purposes of the procedures laid down in the EIA Directive, which cannot prejudge the subsequent decision on development consent by the competent authority, that interpretation cannot remain confined, in my view, to considerations of a substantive nature, as the referring court essentially queries. As I explain below, the Court's ruling in *Namur-Est Environnement* must necessarily entail consequences on a procedural level, including the rules related to the limitation periods applicable to challenges brought against a derogation decision, in particular for the public concerned.

44. From the outset, I observe that Advocate General Kokott briefly outlines those consequences in her Opinion in *Namur-Est Environnement*, to which I also subscribe. [35] In her view, the circumstance that a derogation decision is provisional in nature implies that any separate challenge against that decision would have to be brought without taking into account the findings of the environmental impact assessment carried out for the purposes of granting development consent. [36] Therefore, it should be possible to challenge the environmental assessment in full, in accordance with Article 11 of the EIA Directive, once the competent authority has adopted its final decision regarding the environmental impact assessment of the project concerned. [37]

45. As has already been stated in point 36 of the present Opinion, the view set out above necessarily extends to a case where it is for the Member State, according to Article 4(2) of the EIA Directive, to determine whether a development project must be made subject to an environmental impact assessment, since that decision must be considered as forming part of the development consent procedure. Furthermore, in my view, a different approach from that outlined by Advocate General Kokott in her Opinion would be capable of being in breach of the principle of effectiveness that applies to the procedural autonomy of the Member States, as recognised under EU law. As follows from the settled case-law of the Court, that principle requires that the Member States not establish procedural constraints that render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order. [38]

46. In that regard, it is important to note that, even though there is no legal requirement, under Article 16(1) of the Habitats Directive, to involve the public concerned in the adoption of a derogation decision, the Court has expressly stated, as regards projects falling within the scope of the EIA Directive, that public participation in respect of those derogations must be effectively

[34] The judgment in *Namur-Est Environnement*, paragraph 57 and the case-law cited.

[35] Opinion of Advocate General Kokott in *Namur-Est Environnement* (C-463/20, EU:C:2021:868).

[36] Ibid., point 73.

[37] Ibid., point 74.

[38] See, inter alia, judgment of 8 May 2025, *M.K.* (C-324/23, EU:C:2025:324, paragraph 51).

ensured before the adoption of the development consent decision.[39] That applies to a decision to be adopted pursuant to Article 4(2) of the EIA Directive, where the public concerned must be involved for the purpose of ensuring, like in the case of a full impact assessment, that public views concerning the effects on the environment are taken into account.[40]

47. Therefore, if a derogation decision cannot be challenged after the public concerned has been involved in the decision-making procedure leading to development consent, that public would be deprived of both its participation rights, as recognised by the case-law of the Court in relation to the EIA Directive, and its right to access to judicial review. In essence, that would mean that the objective of ensuring wide access to justice, as set out in Article 11 of the EIA Directive and Article 9(2) of the Aarhus Convention,[41] would not be achieved.

48. Furthermore, inasmuch as a derogation adopted under Article 16 of the Habitats Directive constitutes a preliminary decision subject to subsequent assessment by the competent authority granting development consent, that derogation cannot reach its full extent, from the perspective of the public concerned, until that authority adopts its final decision. Indeed, it is only at that point that the derogation licence does have practical effect, as Ireland appears to acknowledge in its observations, since no development activity can take place until then.

49. Accordingly, a requirement imposed on the public concerned to challenge a derogation decision forming part of the development consent procedure before the competent authority has made its determination as regards the need for an environmental impact assessment pursuant to Article 4(2) of the EIA Directive risks being in breach of the principle of effectiveness. After all, in such a situation, the public concerned would be required to intervene before a national court prematurely, without being capable of making a comprehensive presentation of the case. At the same time, there is also the risk that that court may make an incomplete judicial assessment. Together, they would affect the overall aim of ensuring effective review of all relevant aspects having an impact on the safeguard of strictly protected species and, therefore, on one of the main purposes of the EIA Directive.

50. It follows that, where a derogation decision under Article 16(1) of the Habitats Directive forms part of the development consent procedure laid down in the EIA Directive, as is the case in the main proceedings, the period in which to challenge the lawfulness of that derogation for the public concerned cannot terminate before a final development consent decision has been adopted. Otherwise, not only would the rights of participation of the public concerned be undermined, but the effectiveness of the judicial review of the derogation decision would also be affected.

51. The view set out above is without prejudice, first, to the requirement that an addressee of the derogation decision, such as a developer, challenge the validity of that decision at an earlier stage. For instance, I note that the judgment of 6 July 2023, *Hellfire Massy Residents Association* (C-166/22, EU:C:2023:545) concerned national legislation which, in essence, criminalises the

[39] The judgment in *Namur-Est Environnement*, paragraph 79 and point 2 of the operative part. In particular, the Court considered public participation to be effective in that regard when, first, it takes place before the adoption of the decision to be taken by the competent authority on development consent for that project; second, it enables the public to express its views in a useful and comprehensive manner on all the environmental effects of that project; and, third, the authority competent for granting consent for the project may take full account of that participation.

[40] See, to that effect and by analogy, judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraphs 46 to 49), where the Court has considered that public participation must be ensured as part of the procedure for deciding on environmental effects.

[41] See, by analogy, judgment of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraph 37).

same activities as those listed in Article 12 of the Habitats Directive except where a derogation decision is granted. In such a case, a procedural rule like that at issue in the main proceedings, which calculates the time limit to challenge the validity of that decision from the date on which it was adopted or on which it could have been known, should not be called into question according to the principle of effectiveness. However, for the reasons already explained in points 46 to 50 above, which refer to the public participation rights and the right of access to justice of the public concerned, national rules on the calculation of the time limits must ensure that that public has the opportunity to act before a court after development consent has been adopted.

52. Second, to my mind, the conclusion reached within the present analysis cannot be called into question by reference to the principle of legal certainty. After all, by ensuring that challenges brought by the public concerned against a derogation decision can only take place (i) once the competent authority has determined, from an overall perspective, whether a project should be subject to an environmental impact assessment and (ii) once the effective participation of the public concerned has been ensured, more legal certainty can be afforded to the procedure in its entirety.

53. Third, for the purpose of the present analysis, the circumstance, raised by the referring court in the order for reference, that the applicants in the main proceedings did not contest the planning permission decision on the basis of the defects of the derogation decision appears to me to be irrelevant. Inasmuch as the derogation decision forms part of the development consent procedure, as argued in the present Opinion, the invalidity of that decision must necessarily have an impact on the implementation of the development project, which cannot be carried out without that decision.

54. In the light of the foregoing considerations, I take the view that Article 11(2) of the EIA Directive must be interpreted as meaning that, where a derogation decision adopted under Article 16(1) of the Habitats Directive forms part of the development consent procedure laid down in the EIA Directive, the period in which to challenge the lawfulness of that derogation cannot terminate for the public concerned before the date of the development consent decision.

55. In so far as the third question referred is based on the premiss that the period in which to challenge the lawfulness of a derogation licence can terminate before that date, there is no need to provide an answer to that question concerning, as stated in point 30 above, the interpretation of Article 11(5) of the EIA Directive.

B. The fourth and fifth questions

56. It follows from the analysis of the first and second questions referred that, where the Court's findings in the judgment in *Namur-Est Environnement* apply, the period in which to challenge the lawfulness of a derogation decision cannot terminate for the public concerned before the date of the development consent. Since that is the premiss on which the fourth and fifth questions referred are based, should the Court share my analysis, it would have to provide an answer to those questions as well.

57. As a reminder, by the fourth and fifth questions referred, the referring court seeks to clarify the conditions that must be met, from a substantive point of view, for the purposes of granting a derogation decision under Article 16(1) of the Habitats Directive. More specifically, the referring court asks, first, whether that provision requires an effective examination of alternative solutions to the derogation requested, for instance concerning the location of the species concerned or

simply the alternative of not granting that derogation at all. Second, the referring court asks whether Article 16(1) of the Habitats Directive precludes a competent authority from adopting a derogation decision in order to carry out a development project on the ground that that project is in the interests of the protection of wild fauna and flora and the conservation of natural habitats, as the competent authority did in the case in the main proceedings.

58. As follows from points 5 and 6 of the present Opinion, Article 12 of the Habitats Directive establishes a system of strict protection for the animal species listed in Annex IV(a) thereto. The aim of that provision is to ensure the survival and protection of vulnerable animal species by prohibiting activities that could harm them or their habitats. In particular, it prohibits the deterioration or destruction of breeding sites and resting places of those animals.

59. Article 16(1) of the Habitats Directive, for its part, outlines the conditions under which Member States can make exceptions to the strict protection measures for certain animal species and thus derogate from Article 12 of that directive. Those derogations are permitted under specific circumstances, listed in a precise and exhaustive manner, such as for the protection of wild fauna and flora,[42] or for other imperative reasons of overriding public interest, including those of a social or economic nature.[43]

60. According to the case-law of the Court, even though Article 16(1) of the Habitats Directive allows Member States to derogate from Article 12 thereof, a derogation adopted on that basis, in so far as it allows those Member States to sidestep the obligations under the system of strict protection of natural species, is subject to the conditions that there is no satisfactory alternative and that that derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.[44]

61. The Court has further stated that the burden of proving that those conditions are present for each derogation is on the authority adopting the derogation decision.[45] Moreover, since Article 16 of the Habitats Directive constitutes an exception to the system of protection provided for by that directive, it must be interpreted restrictively.[46] That provision also needs to be applied appropriately in order to deal with precise requirements and specific situations.[47]

62. In the first place, it can be easily inferred from the Court's previous statements that, where the competent authority intends to grant a derogation under Article 16(1) of the Habitats Directive, that authority must examine, as a preliminary step, whether the objective pursued by that derogation can be achieved by means of a satisfactory alternative. The Court has stated unequivocally in that regard that a derogation may only be granted where the objective sought by the derogation cannot be attained in a satisfactory manner by an alternative solution.[48] The obligation to examine alternative solutions in the context of an application for a derogation is of the utmost importance, since, according to the wording of Article 16(1) of the Habitats Directive, the absence of those alternatives and the circumstance that the proposed project is not

42 See Article 16(1)(a) of the Habitats Directive.

43 See Article 16(1)(c) of the Habitats Directive.

44 Judgment of 11 July 2024, *WWF Österreich and Others* (C-601/22, EU:C:2024:595, paragraph 49 and the case-law cited).

45 Ibid., paragraph 50 and the case-law cited.

46 Ibid., paragraph 50 and the case-law cited.

47 Ibid., paragraph 51 and the case-law cited.

48 See judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraph 47).

detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range are preconditions for that derogation,[49] which means that such an application must be rejected where those conditions are not met.[50]

63. Furthermore, it is important to point out that, according to the case-law of the Court, the competent authority's examination must be accompanied by the discharge of another relevant formal obligation. Indeed, when deciding on an application for a derogation, a competent authority must provide a precise and adequate statement of reasons referring to the reasons, conditions and requirements laid down in Article 16(1) of the Habitats Directive[51] and, in particular, the absence of another satisfactory solution allowing the objectives relied upon in support of the derogation in question to be attained.[52] It is important to recall that this obligation is crucial, inter alia, for the purposes of the exercise, by the public concerned, of the right to access to justice, as described in the first part of the present Opinion. After all, compliance with the obligation to state reasons must allow that public, in the context of the application of species protection measures, to understand the grounds on which the competent authority adopted its decision after the derogation procedure was completed and thus to decide, under the best possible conditions and in full knowledge of the circumstances, whether to bring an action before a court. At the same time, the statement of reasons must allow that court to exercise its power of judicial review and to assess, in particular, whether or not the decision is vitiated by any error.[53]

64. In the present case, it follows from the information provided in the order for reference that no alternative solution with less impact on strictly protected species, or simply the alternative of not granting the authorisation at all for the project, was examined. The referring court specifically notes that the derogation decision at issue in the main proceedings merely stated that 'there [was] no satisfactory solution'. Although it is for that court to carry out the final assessment in that regard, it can be inferred from that information that the competent authority appears to have manifestly failed to fulfil the obligations that arise from Article 16(1) of the Habitats Directive, namely the obligation to examine the existence of satisfactory alternative solutions and the obligation to provide a precise and adequate statement of reasons in that regard, as is expressly required by the case-law of the Court.[54]

65. In the second place, as regards whether a competent authority can conclude, in a derogation decision, that it is in the interest of the protection of wild fauna and flora and the conservation of natural habitats to authorise a developer to derogate from the provisions of Article 12 of the Habitats Directive, I observe that that statement refers, in particular, to the grounds for derogation laid down in Article 16(1)(a) of that directive.

66. Up until now, the Court has never had the opportunity to interpret the meaning of that provision in its case-law. Nevertheless, it follows from the wording of Article 16(1)(a) of the Habitats Directive that the granting of a derogation on that ground requires that it be demonstrated that the derogation at issue generally promotes the protection of wild fauna and

[49] See, in that regards, judgment of 10 May 2007, *Commission* v *Austria* (C-508/04, EU:C:2007:274, paragraph 115).

[50] See, to that regard, judgment of 14 June 2007, *Commission* v *Finland* (C-342/05, EU:C:2007:341, paragraph 31).

[51] Ibid., paragraph 25 and the case-law cited.

[52] Ibid., paragraph 30.

[53] See, in that regard, judgment of 15 June 2023, *Eco Advocacy* (C-721/21, EU:C:2023:477, paragraph 33). Moreover, the statement of reasons is also relevant for the authority in charge of carrying out the environmental assessment of a project and of adopting the development consent decision under the EIA Directive, as explained in the first part of the present Opinion.

[54] That is precisely the approach described by the Government of Ireland in the 'Guidance on the strict protection of certain animal and plant species under the Habitats Directive in Ireland', pp. 11 and 12, available at https://www.npws.ie/sites/default/files/files/strict-protection-of-certain-animal-and-plant-species.pdf.

flora and the conservation of natural habitats. In essence, Article 16(1)(a) of the Habitats Directive provides a mechanism for balancing the need to protect certain species and habitats with the potential need to manage other species or habitats that may be threatened. It allows for a flexible approach to conservation, recognising that, in certain contexts, interventions are necessary to ensure the long-term health of ecosystems. As has already been stated, since Article 16(1)(a) of the Habitats Directive constitutes an exception to the system of protection provided for by that directive, it must be interpreted restrictively and, in accordance with the case-law of the Court, in the light of the precautionary principle. [55]

67. Against that backdrop, and as the Commission argues, it appears difficult to take the view that a development project, such as that at issue in the main proceedings, intended to build residential units which will result in the destruction of the resting sites of a colony of a protected species, can fall within the scope of the ground for derogation laid down in Article 16(1)(a) of the Habitats Directive. That is all the more so if account is taken of the fact that, contrary to the obligations that apply to competent authorities, as has already been explained in point 63 of the present Opinion, no reason is given to explain how the project at issue would help to protect wild fauna and flora and the conservation of natural habitats. It follows that, as the referring court reasons, all those elements, taken together, suggest a manifest error by the competent authority in stating the appropriate ground for the derogation applied to the project at issue in the main proceedings.

68. In the light of the foregoing, I conclude that Article 16(1) of the Habitats Directive must be interpreted as meaning that an effective examination of alternative solutions must be carried out by a competent authority for the purpose of granting a derogation under that provision and that that authority must state the specific reasons underlying the derogation applied. Moreover, a competent authority cannot rely on the ground for derogation laid down in Article 16(1)(a) of the Habitats Directive in order to authorise a development project, in particular where no reasons are given to explain how that project promotes the protection of wild fauna and flora and the conservation of natural habitats.

V. Conclusion

69. On the basis of the analysis set out above, I propose that the Court answer the questions referred by the High Court (Ireland) as follows:

(1) Article 11(2) of 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

must be interpreted as meaning that, where a derogation decision adopted under Article 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora forms part of the development consent procedure laid down in Directive 2011/92, the period in which to challenge the lawfulness of that derogation cannot terminate for the public concerned before the date of the development consent decision.

(2) Article 16(1) of Directive 92/43

[55] See, by analogy, judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraphs 66 and 69).

must be interpreted as meaning that an effective examination of alternative solutions must be carried out by a competent authority for the purpose of granting a derogation under that provision and that that authority must state the specific reasons underlying the derogation applied. Moreover, a competent authority cannot rely on the ground for derogation laid down in Article 16(1)(a) of Directive 92/43 in order to authorise a development project, in particular where no reasons are given to explain how that project promotes the protection of wild fauna and flora and the conservation of natural habitats.